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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

—o—

MARTIN HARRIS, *et al.*,
Plaintiffs-Respondents,

v.

IRENE PERNSLEY, *et al.*,
Defendants-Respondents,

RONALD D. CASTILLE,
District Attorney of Philadelphia County,
Proposed Intervenor-Petitioner.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Is the Philadelphia District Attorney, who has an interest in protecting valid prison incarceration orders, entitled to intervene in a prison conditions lawsuit which plaintiff inmates and municipal official defendants plan to settle by consenting to the release of inmates?

2. Absent any constitutional or federal law violations, does the supremacy clause permit a federal court to approve a consent decree which overrides state statutory law, case law, and judicial orders where the settling parties could not otherwise lawfully undertake such actions?

3. Is certiorari also warranted to resolve the conflict among the circuits as to whether an abuse of discretion standard of review or a plenary or *de novo* standard of review should be applied in ruling on motions to intervene as of right?

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Petitioner, Ronald D. Castille, District Attorney of Philadelphia County, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this matter. The opinion was filed on May 15, 1987, and the court's judgment and mandate were entered on June 23, 1987.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, for which review is sought, is reported at 820 F.2d 592, and reprinted in the appendix (App.) at App. 101-146.

The immediately preceding memorandum decisions of the United States District Court for the Eastern Dis-

trict of Pennsylvania (Shapiro, D.J.) have been reported at 113 F.R.D. 615, 654 F. Supp. 1042, and 654 F. Supp. 1057. They are reprinted at App. 45-99. Earlier Third Circuit and District Court decisions, entered during the course of the litigation, are reprinted at App. 1-40.

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STATEMENT OF JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the plaintiffs-respondents brought suit against defendants-respondents in the Eastern District of Pennsylvania. Petitioner subsequently sought to intervene as of right. This motion was denied on December 30, 1986, by the assigned District Court judge, the Honorable Norma L. Shapiro. App. 45-68. On May 15, 1987, a divided Third Circuit panel affirmed Judge Shapiro's order. App. 101-149. Next, on June 15, 1987, the full Third Circuit, in a divided vote, denied rehearing. App. 151-155. On June 23, 1987, the Third Circuit's judgment and mandate were issued. App. 147-149.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, article VI, which provides:

> This constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be

> bound thereby, any Thing in the Constitution or Laws of any state to the Constitution notwithstanding.

United States Constitution, amendment eight, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, amendment fourteen, which provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Directly pertinent statutes and rules are reproduced at App. 171-175.

STATEMENT OF THE CASE

On April 30, 1982, ten inmates filed a *pro se* complaint in the United States District Court for the Eastern District of Pennsylvania seeking damages and injunctive relief for themselves and for a class consisting of all inmates who had been incarcerated at Holmesburg Prison, one of the Philadelphia, Pennsylvania, county prisons. Pursuant to 42 U.S.C. § 1983 (1982), appointed counsel for plaintiffs-respondents filed an amended complaint on April 19, 1983, alleging that members of the class had been subjected to conditions at Holmesburg in violation of the eighth and fourteenth amendments. The amended complaint named

as defendants the City of Philadelphia and various municipal officials, including the Mayor (collectively, the municipal defendants-respondents), as well as two state officials —Jay C. Waldman, General Counsel for the Commonwealth, and Ronald J. Marks, Commissioner of the Pennsylvania Bureau of Corrections. On January 3, 1984, District Court Judge Norma L. Shapiro granted the defendants' motions to dismiss on the grounds of *res judicata* and absention, in light of the parallel state action on prison conditions.[1]

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[1]In February of 1971, five inmates of the Philadelphia prison system instituted an equitable class action in the Philadelphia Court of Common Pleas attacking the constitutionality of their conditions of confinement and requesting injunctive relief. On April 7, 1972, a three-judge court held that the then-existing conditions in the Philadelphia County prisons violated the United States and Pennsylvania Constitutions. The *decree nisi* appointed a Prison Master to administer the court's corrective decree; the three-judge state court retained jurisdiction and continued to issue remedial orders and to approve consent decrees entered into by the parties. *See Jackson v. Hendrick,* 10 Pa. Commw. 392, 309 A.2d 187 (1973). On June 7, 1972, the decree, which was later affirmed by the Pennsylvania Supreme Court, became final. *See Jackson v. Hendricks,* 457 Pa. 405, 321 A.2d 603 (1974) (Supreme Court granted discretionary review only to consider the appointment of a master).

The City of Philadelphia subsequently instituted and funded a wide range of reforms to alleviate the conditions found constitutionally unacceptable in 1972. As a consequence, the conditions found improper over fifteen years ago have long since been eliminated, and no findings have been made, in either state court or federal court, of any presently existing unconstitutional conditions. On January 16, 1987, the Pennsylvania Supreme Court assumed extraordinary jurisdiction over the state action and vacated a contempt order against the municipal defendants for failing to comply with population limits which had been earlier fixed by the three-judge *Jackson v. Hendrick* court. In light of *Rhodes v. Chapman,* 452 U.S. 337 (1981), and statutory repeals, the state Supreme Court held that the

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Judge Shapiro's order was reversed by the Third Circuit on February 22, 1985, *see Harris v. Pernsley* [*I*], 755 F.2d 338 (3d Cir. 1985), which on March 21, 1985, with five of the ten circuit judges dissenting, denied the defendants' petitions for rehearing *en banc, see Harris v. Pernley* [*I*], 758 F.2d 83 (3d Cir. 1985) (Judges Adams, Hunter, Garth, Weis and Becker would have granted the petition for rehearing). On November 4, 1985, this Court, with three Justices dissenting, denied *certiorari. See Pennsley v. Harris,* 106 S.Ct. 331 (1985) (Chief Justice Burger, Justice, now Chief Justice, Rehnquist, and Justice O'Connor dissenting).

Plaintiffs-respondents and the municipal defendants-respondents then entered into settlement negotiations and counsel for the plaintiffs filed a second amended complaint which sought to increase the proposed class to include all persons who had been inmates in the entire Philadelphia prison system. Negotiations culminated in a proposed consent decree ("Proposed Consent Decree I"), which was forwarded to the district court on August 15, 1986, before either the first amended complaint or the proposed second amended complaint had been answered by the settling defendants. At that point, no discovery had been conduct-

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legal basis for a "one man, one cell" population limit previously ordered had been eroded, and remanded the case to the Common Pleas Court because a fresh consideration of the "totality of the circumstances was required to determine whether conditions of confinement in the Philadelphia prisons are unconstitutional." *Jackson v. Hendrick,* 509 Pa. 456, 470, 503 A.2d 400 (1986). No such determination has yet been made by the state court.

ed, no new motions had been filed or legal rulings made, and the class action had not been certified.

Proposed Consent Decree I established rules for expediting preliminary hearings, probation hearings, trials and sentencings. Narrow exceptions, which could result in limited extensions of those time periods, were recognized for trial and preliminary hearing schedules, but not for the sentencing or probation revocation proceedings. Non-compliance with these mechanical timetables mandated the release of prisoners. The proposed decree also automatically shortened by thirty (30) days to seventy-five (75) days all judicially-imposed sentences to be served in the Philadelphia prisons and provided that petitioner, the chief prosecutor for the city, could not object to releases except in very limited circumstances. Although this decree rated the prisons' capacity as 4,900, it required the release mechanisms to take effect whenever the population exceeded 3,200.

On August 18, 1986, three days after the proposed decree's submission to the district court, petitioner, the Philadelphia District Attorney, sought to intervene as of right pursuant to Fed.R.Civ.P. 24. The settling parties (plaintiffs-respondents and the municipal defendants-respondents) opposed this request, while the state defendants took no position.

Proposed Consent Decree I was subsequently abandoned by the plaintiffs-respondents and municipal defendants-respondents who, on October 3, 1986, forwarded to the district court a second Proposed Consent Decree ("Proposed Consent Decree II"). Proposed Consent Decree II recognized that the average Philadelphia prison population was 4,300, and required the city to achieve

staged population levels of 4,100, 3,950 and 3,750, through prisoner releases or, in the alternative, by non-admissions.

Petitioner, District Attorney Ronald D. Castille, filed a proposed answer and proposed cross claims for declaratory and injunctive relief against the municipal defendants-respondents on October 9, 1986. The District Attorney then challenged the municipal defendants' power to enter into the proposed decree and alleged that the municipal defendants-respondents, acting through their counsel, the City Solicitor, had attempted to settle civil actions by agreeing to injunctive relief which would unlawfully interfere with the District Attorney's duties and functions.

On October 10, 1986 and October 27, 1986, Judge Shapiro heard evidence and subsequently accepted stipulations relating to petitioner's Motion to Intervene. Oral argument on this motion was heard on November 14, 1986. Argument on Proposed Consent Decree II itself was heard on October 10, 1986 and December 11, 1986. Petitioner's request to stay other matters before the court until after a ruling on his intervention motion was denied. He was, however, allowed to object orally to Proposed Consent Decree II, although his request to present evidence in support of those objections was denied.

On December 31, 1986, petitioner's motion to intervene as a party defendant was denied. Judge Shapiro found: (1) that his motion was untimely, (2) that he had insufficient interest in the litigation, and (3) that the municipal defendants-respondents were adequately representing the District Attorney's interest. She also simul-

taneously approved Proposed Consent Decree II.[2] Its provisions permitted the agreed-upon caps to be met by the simple release of prisoners or, if necessary, by a moratorium on admissions.

On January 8, 1987, petitioner appealed to the Third Circuit from the orders denying his Motion to Intervene and approving the Consent Decree. His subsequent request for a stay pending appeal was opposed by the settling parties and thereafter denied by the District Court on February 19, 1987. On March 6, 1987, however, the Third Circuit ordered "that the motion for a stay pending appeal by Ronald D. Castille is granted until further order of this Court solely as to its provisions of the consent decree placing caps on the population of the Philadelphia Prison System. . . ."

The District Court's denial of petitioner's motion to intervene was affirmed by a divided Third Circuit panel on May 15, 1987. The panel majority recognized that its application of an abuse of discretion, rather than a plenary, standard of review placed it in conflict with, at least, the Ninth Circuit. *See* App. 112. It also recognized that, under state law, petitioner "advocates specific bail levels and

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[2]By this order, the Philadelphia prison population could not exceed the following levels:

as of March 9, 1987	4,100 inmates
as of May 11, 1987	3,950 inmates
as of July 13, 1987	3,750 inmates

The parties to the decree have since amended the decree to reflect the following timetable:

as of July 20, 1987	3,950 inmates
as of September 14, 1987	3,850 inmates
as of October 19, 1987	3,750 inmates

may appeal bail determinations with which he disagrees,'' and that he ''also has the power to advocate sentences'' and ''to defend convictions in both state court actions and habeas actions in federal court. . . .'' *See* App. 115-116. Nevertheless, the panel majority concluded (1) that the ''District Attorney is not prevented from performing his statutory duties,'' and (2) that he did not have an interest sufficient to permit his intervention. *See* App. 119-120. The dissenting judge noted that, while the municipal defendants-respondents had the power to agree to population caps, they did not have the power to agree to an implementation procedure requiring the revocation of valid state sentences and bail determinations. *See* App. 130, 136-139.

On May 29, 1987, petitioner sought rehearing pursuant to Fed.R.App.P. 35 and 41. His companion Motion for Continuance of Stay Pending Rehearing was granted on June 9, 1987. On June 15, 1987, however, the Third Circuit denied rehearing (three of the nine circuit judges voted to rehear the case) and vacated the stay. Issuance of the judgment and mandate occurred on June 23, 1987. Five days later, petitioner filed a Motion to Recall and Stay of Issuance of Mandate and Execution and Enforcement of the Judgment Pending Petition for Certiorari. The Third Circuit, again by a panel divided two to one, denied this request on July 13, 1987.

Next, on July 20, 1987, petitioner asked this Court to recall and stay the Third Circuit's mandate pending certiorari. The Honorable Byron R. White ordered the application referred to this Court for disposition and stayed the Third Circuit's judgment and mandate pending full Court action. On August 3rd, this Court vacated the temporary

stay and denied petitioner's stay request. This timely petition for the issuance of a writ of certiorari followed.

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REASONS FOR GRANTING THE WRIT

IA. PETITIONER, THE PHILADELPHIA DISTRICT ATTORNEY, HAS AN INTEREST IN PROTECTING VALID PRISON INCARCERATION ORDERS. HE, THEREFORE, SHOULD BE PERMITTED TO INTERVENE IN A PRISON CONDITIONS LAWSUIT, WHICH PLAINTIFF INMATES AND MUNICIPAL DEFENDANTS-RESPONDENTS PLAN TO SETTLE BY CONSENTING TO THE RELEASE OF INMATES.

One of the significant issues here presented is whether the Philadelphia District Attorney should be permitted to object to federal "court orders that suspend the normal operation of the state's law regarding the confinement of convicted criminals." *Graddick v. Newman*, 453 U.S. 928, 940 (1981) (Opinion, Rehnquist, J., now C.J., as to the denial of a stay). Although "[o]ne might well regard the answer as self-evident," *id.*, the Third Circuit, despite this case's compelling facts, remarkably concluded otherwise. This Court should review that decision. If it is permitted to stand and otherwise followed, the criminal justice system nationwide will be adversely affected.

The municipal defendants-respondents here decided not to litigate the constitutionality of the challenged prison conditions and agreed, instead, to release hundreds of prisoners despite their incarceration under valid state judicial orders, obtained by petitioner pursuant to his state

mandated powers and duties. In so doing, the municipal defendants-respondents invoked the supremacy clause and used the federal court to legitimize actions which they could not otherwise lawfully or voluntarily undertake, absent proven constitutional violations. As detailed *infra* in section IB, the parties, utterly disregarding the constitutional role of the federal courts, principles of comity, and the permissible uses of the supremacy clause, called upon the district court to approve their agreement. This section establishes petitioner's interest in the lawsuit, in which respondents have thus far shielded their private, unlawful arrangements by successfully claiming that petitioner is without sufficient interest to intervene.

The Third Circuit's denial of petitioner's intervention motion and approval of the challenged consent decree voided many of the District Attorney's state-assigned duties, preempted state statutory law, conflicted with state case law, and contravened hundreds of valid state judicial sentencing and bail orders. Such disregard for a state's law enforcement scheme, when there has been no finding of any constitutional or federal law violation, mandates this Court's review.[3]

Petitioner's interest for intervention purposes must be determined by reference to his powers and duties under

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[3]Previously, three Justices of this Court voted to grant certiorari to determine whether, under the abstention doctrine, federal court relief would be appropriate in this case. *See Pernsley v. Harris I*, 106 S.Ct. 331 (1985) (Chief Justice Burger, Justice, now Chief Justice, Rehnquist, and Justice O'Connor dissented from the denial of certiorari). The comity considerations raised by the abstention issue still exist, and the case's later developments, *i.e.* a federal court's approval of relief which violates state law and is beyond the authority of either the court or the parties to grant, must be viewed as equally, if not more, troubling.

state law. *See Olden v. Hagerstown Cash Register, Inc.*, 619 F.2d 271, 273 (3d Cir. 1980).[4] Both respondents and the Third Circuit have concluded that petitioner lacks such an interest because this is a "prison conditions" rather than an "inmate release" suit, and, under state law, petitioner has no interest in prison conditions. This approach

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[4]To intervene as of right, a party must show that he has an interest in the case, that this interest will be adversely affected by the case's disposition, that the existing parties will not adequately represent the interest, and that the intervention application was timely. *See Commonwealth v. Rizzo*, 530 F.2d 501, 504 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976). The Third Circuit panel majority concluded that petitioner did not have an adequate interest and, therefore, did not reach the issues of timeliness of application and adequacy of representation. The dissenting judge, however, correctly concluded that petitioner had met all three requirements.

Regarding the timeliness of his motion, petitioner had no inkling before August of 1986 that the municipal defendants-respondents might agree to mandated releases. Previously, these same municipal officials vigorously litigated this case, and bitterly opposed the imposition of population caps and mandated releases in the parallel state action. (Indeed, they then, like petitioner now, took the position that mandated releases contravene valid state judicial orders and are beyond the authority of municipal officials to implement. *See* App. 162-171.) Petitioner moved to intervene almost as soon as he learned that the municipal defendants-respondents planned to settle the lawsuit, and just three days after respondents submitted Proposed Consent Decree I to the district court. Moreover, respondents abandoned this agreement and did not submit Proposed Consent Decree II to the district court until October 3, 1986.

Likewise, petitioner met his minimal burden of establishing that his interests were not being adequately represented. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 539 n.10 (1972). This inadequacy occurred when the municipal defendants, who had previously sought the suit's dismissal, decided in favor of a settlement which would affect petitioner's ability to perform his job. The city's interest then was in saving itself the expense of litigating the prison conditions issue. Petitioner's interest, of course, was and is in defending legally obtained sentences and bail determinations. *See also* Dissent, Garth, J., n.3 at App. 131-132.

misses the point. Petitioner has not sought to involve himself in consideration of the prison conditions. Indeed, he would have no interest if the parties had simply agreed to improve prison conditions as by increasing the level of services provided for the inmates or by removing inmates from the allegedly overcrowded prisons and incarcerating them elsewhere. He seeks only to prevent the release of inmates incarcerated pursuant to valid state judicial orders.

Pennsylvania statutory and case law clearly establishes petitioner's interest with respect to the release of incarcerated persons and his right to participate in the proceedings which result in such releases. The panel majority below failed to consider that, although municipal officials have the power to manage the prisons, they do not have the power, absent a finding of unconstitutional conditions, to release prisoners without following state law pertaining to the criteria and procedures for the release of prisoners. Further, it mischaracterized petitioner's interest as merely a generalized interest based on a concern that his law enforcement duties might be made a bit more difficult.[5]

Petitioner is not simply claiming that his job will be made more difficult. Rather, he will be entirely prevented from fulfilling some of his duties. Petitioner has a particularized interest in obtaining and defending bail orders and sentences of incarceration for those persons he prose-

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[5]The court compared the impact of the city's agreement to release prisoners to the impact of the city's budgetary decisions. It failed to recognize, however, that any decision, including a budgetary decision, may be improper if its effect is to prevent another state actor from properly carrying out his duties. *See Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193, *cert. denied*, 402 U.S. 974 (1971).

cutes. Respondents and the Third Circuit wrongly concluded that he is unaffected by the consent decree merely because it does not affirmatively state that he must either act or refrain from acting in a particular manner. A party may have an interest based on the practical effect of a consent decree on his state authorized duties even if he is not formally bound by specific reference in the decree. *See Cobb v. Aytch,* 539 F.2d 297 (3d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977).[6]

Pennsylvania courts have long recognized petitioner's interest in representing "the Commonwealth's interests in the enforcement of its criminal laws," *Commonwealth ex rel. Specter v. Bauer,* 437 Pa. 37, 41, 261 A.2d 573, 576 (1970), by defending and preserving the integrity of incarceration orders he has obtained. The federally approved consent decree effectively vitiates petitioner's ability to do this.[7] It is absurd to contend that petitioner has an

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[6]Although relied upon by the Third Circuit, *Cobb,* in fact, supports petitioner's position. In *Cobb,* inmates objected to their transfer between state and county prisons, and state officials agreed by a consent decree that the prisoners would not be transferred. The District Attorney there was found not to have standing only because he had no state-assigned responsibilities concerning transfers. The District Attorney, however, has state-assigned responsibilities with regard to releases. Therefore, like the superintendent in *Cobb* (who had standing because of a state statute requiring his participation in transfers), he has standing to object to the consent decree's effect on these duties.

[7]The implementation provisions of the consent decree (App. 75) specifically provide that releases will be accomplished "through the mechanism of the Bail Master appointed by the *Jackson* [*v. Hendrick*] court or otherwise." The mere fact that releases may be accomplished by an already-existing state court program fails to address petitioner's objections and the perversion of the existing scheme. First, although the *Jackson*

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interest in obtaining convictions and incarceration orders but no interest in their enforcement.[8] Indeed, the courts have specifically recognized petitioner's interest in objecting to the release of incarcerated persons even when there is no specific statute requiring his participation in that par-

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v. Hendrick court (which is not a court of record) presently releases the inmates with the lowest bail, there is no "cap" which must be met, and, thus, no sanction when the District Attorney challenges inappropriate releases. The federally mandated cap alters this situation. To meet it, the *Jackson v. Hendrick* court will be required to release many more inmates—inmates with significantly higher bail than those inmates now being released, although state judges have found them to be risks to the community or substantial flight risks. Indeed, *Jackson v. Hendrick* "lists" have already been increased from 150 to 200 cases per week, and will certainly be increased further given the City's recent inability even to consistently meet the July 20, 1987 cap which exceeds by 200 the final cap of 3,750 effective October 19, 1987. Further, petitioner can only assume that early releases will be obtained "otherwise" in proceedings absent his participation. Even if participation were allowed, however, the "cap" guarantees that such participation would not be legally meaningful, since the cap merely creates a choice of evils. Finally, if required population caps are not achieved by releases, an alternative drastic sanction will be employed: a mortorium on admissions. The only defendants exempted from such non-admissions are those charged with or convicted of murder, forcible rape or an aggravated assault or robbery at knife or gunpoint. The decree thus permits the non-admission of persons with an enormous potential for flight, as well as persons charged with or convicted of attempted murder, attempted rape, kidnapping, involuntary deviate sexual intercourse, robbery, aggravated assault or narcotics sales. Plainly, this circumstance will adversely affect both petitioner's and the public's interest.

[8]The interest in preserving valid incarceration orders is recognized by federal courts every day when state prosecutors appear to defend convictions at federal habeas corpus proceedings. *See, e.g., Matarese v. LeFevre*, 801 F.2d 98 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1353 (1987); *Conce v. Redman*, 780 F.2d 333 (3d Cir. 1985); *Forward v. Gernert*, 287 F. Supp. 680 (E.D. Pa. 1968).

ticular type of release. *See In re Miller,* 209 Pa. Super. 47, 51, 224 A.2d 89 (1966) (rejecting argument that the district attorney is without standing to appeal and stating "It is our view that one of the duties necessarily implied is to represent the Commonwealth generally in the administration of justice in the juvenile court, and *specifically with respect to the discharge of inmates from state correctional institutions.*") (emphasis added).[9]

Pennsylvania's statutory law and court rules confirm petitioner's interest in inmate releases. As noted, to achieve the required "cap," the consent decree provides for the release of pre-trial detainees by bail reductions, the release of sentenced prisoners two months early, and, if necessary, the non-admission of newly convicted and sentenced criminals. The provisions modifying bail orders and sentences plainly preempt state modification procedures. State law permits petitioner's participation both when a sentence is modified and when early parole is granted. Under state law, a sentence can be modified only within thirty days of imposition and only if a petition for modification was filed within ten days. *See* Pa.R.Crim.P., Rule 1410. Modification is not permitted once the Superior Court has affirmed the conviction on appeal. *See* Pa. R.A.P., Rule 1763. Both of these state statutes are violated to the extent the consent decree permits sentence modification. Further, even when a sentence is reduced

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[9]Although petitioner was denied intervention in the parallel state court prison conditions suit because his application was deemed untimely, a state appellate court did find that the release of pre-trial detainees to alleviate alleged overcrowding, "affects the prosecutorial interests of the District Attorney," and that his interest "may have justified intervention had his application been timely . . . ." *Jackson v. Hendrick,* 72 Pa. Commw. 63, 456 A.2d 229, 233 (1983).

by only one or two months, as respondents plan, state courts have specifically found that petitioner has standing to object.[10] Moreover, while sentencing courts (unlike prison officials) may grant parole to defendants serving county prison sentences (sentences of less than two years), they may do so only after petitioner has been given notice and a hearing has been held so that petitioner can object.[11]

Petitioner's state-mandated role with respect to the release of bailed defendants likewise has not been adequately preserved and protected. The prosecutor has a vital role in bail determinations,[12] and state law requires that "bail shall be such as to insure the presence of the defendant. . . ." Pa.R.Crim.P., Rule 4004. Yet, the consent decree effectively does not provide for consideration of the likelihood of flight by a defendant or any of the other pertinent considerations specified by state court rule. *See* Pa.R.Crim.P., Rule 4004; App. 173. Moreover, with

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[10]See *Commonwealth v. Yoder*, 249 Pa. Super. 389, 391 n.1, 378 A.2d 350 (1977) ("district attorney is the proper party to appeal the action by the lower court" which entered an order reducing defendant's sentence by one month). Moreover, Pennsylvania law does not permit the modification of a sentence without notice to petitioner. *See Commonwealth v. Hobson*, 306 Pa. Super. 99, 102, 452 A.2d 22 (1982).

[11]Inmates in Philadelphia county prisons may be granted parole only under authority of Pa.Stat.Ann., tit. 61, § 314 and § 331.26 (Purdon 1964). App. 173-175. The city may not create a new county parole procedure given Pa.Stat.Ann., tit. 61, § 331.1 (Purdon 1964): "it is the intent of this act to create a uniform and *exclusive system for the admisintration of parole* in this Commonwealth" (emphasis added).

[12]It is a prosecutor's responsibility to seek the incarceration of defendants who present substantial bail risks and to meet the burden of establishing such defendants' ineligibility for pretrial release. *See Commonwealth v. Truesdale*, 449 Pa. 325, 338, 296 A.2d 829 (1972); *Commonwealth v. Heiser*, 330 Pa. Super. 70, 72, 478 A.2d 1355 (1984).

the cap and the specter of non-admissions hanging over the prosecutor's head if sufficient releases are not ordered, any participation by petitioner is illusory. He can only decide who he wishes to have walking the street, not whether valid objections to release can be offered by him.[13] If cases of defendants incarcerated pre-trial were reconsidered with reference only to the state provided criteria, few would warrant bail reduction. Under the consent decree, however, many orders obtained by petitioner will necessarily be routinely voided. Bail orders must be reduced in a quantity sufficient to meet the population cap. Hence, the state-mandated criteria must necessarily be replaced with one inquiry: has the prison cap been met today?[14]

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[13]The District Court reasoned that a large number of Philadelphia's pre-trial inmates are held on "low bail" simply because they lack sufficient funds, and that this "[l]ow bail suggests that the judicial officer setting it did not consider such defendants a serious threat to the public safety." *See* App. 96. This is misleading. According to Philadelphia's bail guidelines, bail of $5,000 (which requires the posting of only $500 under the court bail program) is recommended for serious felonies such as attempted murder, voluntary manslaughter, aggravated assault, attempted rape, statutory rape, attempted involuntary deviate sexual intercourse, robbery, narcotics sales, murder, kidnapping, rape, arson, and any other first degree felony. (Bail commissioners may not deviate from these guidelines except under limited circumstances. *See* Phila.Crim.R. 500-520.) Such individuals are now routinely considered for release in the *Jackson v. Hendrick* court.

[14]Local authorities cannot impose rules which conflict with the Pennsylvania Rules of Criminal Procedure. *See Commonwealth v. Mitchell*, 242 Pa. Super. 543, 548, 364 A.2d 406 (1976). The consent decree, however, has precisely this effect in both the pre- and post-trial context. By way of further illustration,

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In sum, the Third Circuit has sanctioned a far-reaching and unwarranted intrusion into a state court criminal justice system—a system in which petitioner has a central role. Petitioner is the sole public official responsible for enforcing the criminal law and prosecuting criminals. *See* Pa.Stat.Ann., tit. 16, § 1402(a) (Purdon Supp. 1987); App. 172. It defies common sense and ignores state law to allege that this responsibility does not include a meaningful role in the process whereby bails or sentences are determined.[15] Petitioner's powers and duties under state law are fundamentally altered by the consent decree. The Third Circuit's contrary conclusion is wrong and must be corrected by this Court.

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post-trial sentencing reductions necessitated by the decree deprive petitioner of his state law right to appeal sentences that fall short of those required by the Mandatory Minimum Act or the sentencing guidelines. *See Commonwealth v. Sheridan*, 348 Pa. Super. 574, 502 A.2d 694 (1985) (petitioner has the right to appeal sentence below the guidelines); Pa.Stat.Ann., tit. 42, § 9717(a) and (b) (Purdon Supp. 1987) (mandatory sentence of twelve months for theft by deception against an elderly person, parole not permitted).

[15]The decree's third alternative, non-admissions, is simply a drastic form of bail reduction, sentence modification or early parole. Non-admissions of convicted criminals, or defendants likely to flee, do not, like a somewhat reduced budget or small courtrooms, make petitioner's job more difficult. Rather, they abrogate his state-assigned duty to enforce the law by seeking convictions and advocating and obtaining proper sentences. Although the courts below apparently believe otherwise, obtaining convictions and insuring that sentences imposed are actually served are unquestionably part of petitioner's power and duty "to represent the Commonwealth's interest in the enforcement of its criminal laws." *Mummau v. Ranck*, 531 F. Supp. 402, 405 (E.D. Pa. 1982), *aff'd*, 687 F.2d 9 (3d Cir. 1982), *quoting Commonwealth ex rel. Specter v. Bauer*.

IB. ABSENT PROVEN CONSTITUTIONAL VIOLATIONS, PARTIES MAY NOT INVOKE THE SUPREMACY CLAUSE TO SETTLE A PRISON CONDITIONS LAWSUIT UPON TERMS WHICH OVERRIDE STATE LAW AND STATE JUDICIAL ORDERS AND WHICH AUTHORIZE ACTIONS THAT COULD NOT OTHERWISE VOLUNTARILY BE UNDERTAKEN.

The second critical issue here presented is whether, absent a finding of constitutional violations, settling parties can invoke the supremacy clause to shield their otherwise unlawful arrangements. Cases and courts considering this question have been divided in their approaches. Unless this Court grants review and offers a definitive resolution, there is a high potential for widespread disruption by subsequent, such ill-based, consent decress.

Instantly, the findings below that the District Attorney lacks the requisite interest to intervene allowed the parties to this prison conditions suit to perfect an unlawful settlement adversely affecting criminal prosecutions and judicial orders.[16] This should not be permitted to occur.

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[16]Petitioner acted properly in attempting to make his objections by way of intervention. He could have brought a separate suit since consent decrees are open to challenge by persons not a party to them. *See e.g., Dunn v. Carey,* 808 F.2d 555 (7th Cir. 1986); *Samayoa v. Chicago Bd. of Educ.,* 807 F.2d 643, 645 (7th Cir. 1986); *see also Ashley v. City of Jackson, Mississippi,* 464 U.S. 900, 903 (1983) (Justice Brennan and Justice, now Chief Justice, Rehnquist dissenting from denial of certiorari). Courts have uniformly held, however, that objections to a consent decree are best made by a motion to intervene rather than by a separate action for an injunction in a different federal court, *see Adams v. Bell,* 711 F.2d 161 (D.C. Cir. 1983) (*en banc*), *cert. denied,* 465 U.S. 1021 (1984), or by a subsequent collateral attack, *see Society Hill Civic Ass'n v. Harris,* 632 F.2d 1045, 1052 (3d Cir. 1980).

It is the city's responsibility to provide facilities for all persons ordered to be incarcerated. Should the number of such persons overwhelm the city's financial resources, it may seek and obtain assistance from the state. *See County of Allegheny v. Commonwealth*, 507 Pa. 360, 376-78, 490 A.2d 402 (1985).[17] Municipal officials, of course, have the authority to manage their prisons. This authority gives them a role in the hiring and firing of prison employees, physical maintenance, and the provision of services. Their management function also permits them to respond to the inmates' suit by improving the prison conditions.

Contrary to the view of the municipal defendants-respondents and the Third Circuit, however, releasing inmates from prison, either individually (as here) or en mass, is not a component of prison management. It is the state court system which decides who belongs in prison. The city must accept all persons held under judicial orders although it may incarcerate them in a prison managed as

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[17]To alleviate prison overcrowding in Pennsylvania, the governor can place county prisoners in state facilities. *See* Pa. Stat.Ann., tit. 42, § 9762(3) (Purdon 1982). Other states have enacted legislation to address overcrowding, *see Benjamin v. Malcolm*, 564 F. Supp. 668, 690 (S.D.N.Y. 1983) (referring to such legislation enacted in Michigan, Ohio, Connecticut, and Georgia, and proposed in New York), *aff'd*, 803 F.2d 46 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1358 (1987), or obtained alternative places to incarcerate inmates, *see e.g.*, The New York Times, "Crowded Jails: Hard Solutions," B1 (August 14, 1987) (New York City leased a barge to house 396 inmates).

the city desires.[18] Here, however, the municipal defendants-respondents, absent any finding of constitutionally impermissible conditions, chose simply to release inmates. While they apparently believed release was the easiest option for them, their action usurped the powers of petitioner and other state actors. *See* section I, *supra*. *See also* Pa.Stat.Ann., tit. 42, § 9751 (Purdon 1982); Pa.R. Crim.P., Rule 1401 (trial judge imposes sentence); Pa.R. Crim.P., Rules 4003, 4004 (bail criteria).

The critical issue is this: when respondents presented their consent decree to the district court, that court was

> not being asked to put its sanction behind a substantive result that the parties would be empowered to achieve themselves, as is the case in the usual consent decree; rather, [the court was] being asked to effectuate a substantive result which the parties wholly lacked the jurisdictional power to bring about themselves.

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[18]The Philadelphia Home Rule Charter permits the Department of Public Welfare to determine the capacity of each city penal institution. *See* Philadelphia Home Rule Charter 5-700(c). There is no suggestion in the Charter, however, that the city can unilaterally release sentenced prisoners to meet these determined capacities. The basis of Philadelphia's prison overcrowding problem was identified three years ago by Pennsylvania Supreme Court Chief Justice Nix. He said it "results from the fact that past successive city administrations have avoided the inevitability of providing additional facilities through rationalization, dilatoriness and procrastination" and that the "indiscriminate wholesale release of, or the refusal to accept prisoners without consideration for the security and safety of the citizens of this city, would represent the epitome of irresponsibility and can obviously not provide a permissible solution to the present problem." *Jackson v. Hendrick*, Nix, C.J., Memorandum Opinion and Order of October 17, 1984, staying a prison population cap order.

Overton v. City of Austin, 748 F.2d 941, 956 (5th Cir. 1984).[19] In challenging this arrangement, petitioner does not contend that respondents must litigate the constitutionality of the prison conditions rather than settling their dispute by entering a consent decree, enforceable by the federal court. There are numerous actions which the municipal officials could agree, in such a consent decree, to undertake. But any action agreed to by the municipal defendants-respondents must be within their authority.

Here, respondents can enforce their present agreement only by gaining federal court approval and invoking the supremacy clause to enforce the federal order despite its conflict with state law. The supremacy clause, however, may be invoked to preempt state law only if there is a proven constitutional violation. *See Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983); *but see Badgley v. Santacroce*, 800 F.2d 33 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 955 (1987).

This Court should resolve the conflict among the circuit courts as to whether a consent decree can preempt state law in the absence of a finding of a federal law violation.[20] To hold that a consent decree can preempt

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[19]In *Overton*, the court concluded that, absent a "properly grounded judicial determination that the present charter provisions [establishing the method of election] are illegal, the consent of the parties provides an insufficient basis on which to judicially ordain a different system of council election and composition." *Id.* at 957.

[20]Some federal courts have insisted erroneously that any federal judgment may override conflicting state law or state court orders. *See e.g. Badgley v. Santacroce*, 800 F.2d 33, 38 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 955 (1987); *San Francisco v. San Francisco Police*, 621 F. Supp. 1221 (N.D. Cal. 1985); *United States v. A.T.T.*, 552 F. Supp. 131, 155 (D.D.C. 1982), *aff'd, Maryland v. United States*, 460 U.S. 1001 (1983). Other

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state law, absent a federal law violation, is to ignore an enormous potential for abuse and collusion.[21] Parties could vitiate bothersome state laws simply by agreeing to ignore them and obtaining a federal court's settlement approval without even a *prima facie* showing of any federal law violation. *See Maryland v. United States*, 460 U.S. 1001, 1002 (1983) (Justice, now Chief Justice, Rehnquist, with whom Chief Justice Burger and Justice White joined, dissenting) ("I am troubled by the notion that a district court, by entering what is in essence a private agreement between parties to a lawsuit, invokes the power of the Federal Govment to preempt state regulatory laws.").[22]

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courts, however, have recognized that, absent a federal law violation, a consent decree entered in federal court cannot preempt state law. *See Overton v. City of Austin*, 748 F.2d 941, 956 (5th Cir. 1984); *Washington v. Penwell*, 700 F.2d 570, 573 (9th Cir. 1983); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045, 1057 (3d Cir. 1980) (consent decree cannot authorize HUD to fund housing that does not comply with the local zoning ordinances).

[21]The question of the power of local officials to avoid troublesome litigation in federal court by entering consent decrees which impinge on state law arises not only in prison conditions suits but in a wide variety of other contexts. *See e.g., Firefighters Local Union v. Stotts*, 467 U.S. 561 (1984) (Title VII); *Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984) (election system); *Society Hill Civic Ass'n v. Harris*, 632 F.2d 1045 (3d Cir. 1980) (low-income housing and zoning); *United States v. A.T.T.*, 552 F. Supp. 131 (D.D.C. 1982) (anti-trust), *aff'd, Maryland v. United States*, 460 U.S. 1001 (1983).

[22]These Justices again expressed their concern about remedies for alleged federal law violations which may themselves violate the law in *Bushey v. New York State Civil Service Commission*, 469 U.S. 1117 (1985) (dissenting from denial of certiorari, Chief Justice Burger, Justice, now Chief Justice, Rehnquist and Justice White). *See also Leslsz v. Kavanagh*, 807 F.2d 1243, 1253 (5th Cir. 1987) ("If as appellees argue, a federal court may take almost any action against a state to enforce a consent de-

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This case presents important questions about consent decrees which the Court did not have to decide in *Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063 (1986). The majority in *Local 93* believed that a federal court could enter a consent decree which provided broader relief than the court could have provided by itself if the parties had the legal authority to take the action in question voluntarily. But *Local 93* also recognized that a consent decree could not provide for an action that violates the law. Yet, that is what here occurred. The parties entered a consent decree which voids the authority of a non-party, the District Attorney, and binds the parties to perform actions which violate state law.[23]

The grant of certiorari is, thus, both appropriate and necessary. Settlement is often the preferred means of

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cree so long as it is 'consistent with' the 'spirit' of the applicable constitutional law and the decree itself, there is no limitation on the scope of the court's power."); *Duran v. Elrod*, 760 F.2d 756 (7th Cir. 1985) (absent a constitutional violation, federal courts should not by consent decree reallocate power among the branches of local government in order to permit inmate releases); *Citizens for a Better Government v. Gorsuch*, 718 F.2d 1117, 1135-1136 (D.C. Cir. 1983) (Wilkey, J., dissenting). ("The abuses to which this device [a consent decree] can be put are limited only by the almost inexhaustible imaginations of litigants . . . . EPA and OSHA, for example, could consent not to conduct on site inspections without first rendering 60 days notice."), *cert. denied*, 467 U.S. 1219 (1984).

[23]Respondents have noted that court-ordered release programs are fairly common and that the District Attorney is rarely a party in such suits. They have failed to note, however, the critical fact that, in essentially all of these suits, there has been a judicial finding that the prison conditions violate the Constitution. This differs substantially from the situation here where there is merely an allegation of a constitutional violation and the possibility of expensive or prolonged litigation.

concluding a lawsuit, and consent decrees can provide an efficient and satisfying means of settling complex disputes. Petitioner recognizes this and has no objection to any settlement which improves prison conditions without compelling the release or non-admission of inmates. Opposing parties, however, simply cannot be permitted to settle their differences by reaching a compromise which directly contravenes state law merely because they find it inexpensive and relatively simple to apply and enforce. What occurred here is particularly repugnant since the preempted state law was intended to ensure the proper working of Pennsylvania's criminal justice system and to protect the public from criminal attacks. The consent of the parties is simply an insufficient basis on which to judically ordain a new system of state inmate releases. This Court should so hold.

II. CERTIORARI IS ALSO NECESSARY TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER AN ABUSE OF DISCRETION OR PLENARY STANDARD OF REVIEW SHOULD BE USED IN RULING ON MOTIONS TO INTERVENE AS OF RIGHT.

Finally, certiorari is warranted to resolve the conflict among the circuits as to the proper standard of review in ruling on motions to intervene as of right.

The Third Circuit applied an abuse of discretion standard in reviewing petitioner Castille's motion to intervene as of right. While permissive intervention is reviewed under an abuse of discretion standard, intervention as of

right must be subject to plenary review. *See* Federal Rule of Civil Procedure 24(a) and (b). App. 172.[24]

The majority of the circuit courts have adhered properly to Rule 24(a) and subjected denials of motions to intervene as of right to plenary or *de novo* review. *See, e.g., County of Orange v. Air California,* 799 F.2d 535, 537 (9th Cir. 1986), *cert. denied,* 107 S.Ct. 1605 (1987); *H. L. Hayden v. Siemens Medical Systems, Inc.,* 797 F.2d 85, 87 (2d Cir. 1986); *United States v. Allegheny Ludlum Industries,* 517 F.2d 826, 841 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976); *Central States, Southeast & Southwest Areas Health and Welfare Fund v. Old Security Life Insurance,* 600 F.2d 671, 679 n.15 (7th Cir. 1979). The Third Circuit, however, has now joined the Fourth Circuit, *see Commonwealth v. Westinghouse Electric Corp.,* 542 F.2d 214, 216 (4th Cir. 1976), and at least some panels of the Second Circuit, *see United States v. Hooker Chemicals & Plastics, Corp.,* 749 F.2d 968, 990 (2d Cir. 1984) (Friendly, J.), in ignoring the difference between intervention as of right and permissive intervention.[25]

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[24]Rule 24(b) provides that a court may permit intervention if the rule's requirements are met and should exercise "its discretion" in deciding whether to allow permissive intervention. Courts have held unanimously that this requires application of an abuse of discretion standard. In contrast, Rule 24(a) states that intervention as of right "shall be permitted" when the requirements of the rule are met. The reference to discretion in Rule 24(b) is not included in Rule 24(a).

[25]Both the Third Circuit in this case and the Second Circuit in *Hooker Chemicals* referred to a law review article to support their approach. *See* Shreve, Questioning Intervention of Right—Toward A New Methodology of Decisionmaking, 74 Nw.U.L. Rev. 894 (1980). This article, however, specifically recognized that the present Rule 24(a) does *not* provide the trial court with

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This Court's resolution of that conflict is essential. Plenary review is vastly different from review under an abuse of discretion standard. The latter requires substantial deference towards the trial court's judgment. *See Stringfellow v. Concerned Neighbors in Action*, 107 S.Ct. 1177, 1185 n.1 (1987) (Brennan, J., concurring). "[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court." *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116 (3d Cir. 1976) (*en banc*) *quoting Delno v. Market Street Railway*, 124 F.2d 965, 967 (9th Cir. 1942). Plenary review of a question of law, however, requires the court to make an independent evaluation of the legal issue. *See e.g., Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984). Given the very substantial differences in these standards of review, review by this Court is warranted.[26]

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discretion. The article recommended that Rule 24(a) be redrafted to give the trial court discretion. Although this Court, pursuant to its rule-making power, see 28 U.S.C.A. § 2072 (West 1982), could adopt and implement the proposed change, the Third Circuit was without any authority to make such a change in Rule 24(a).

[26]Respondents seek to dismiss the Third Circuit's error as a labeling problem and claim that the court called its review "abuse of discretion" but actually applied a hybrid of abuse of

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An abuse of discretion standard is especially inappropriate to review the intervention motion of a third party challenging the legality of a settlement agreement which will otherwise escape review. Intervention issues tend often to appear in large class action or institutional reform suits. They, therefore, freq ntly involve large numbers of persons and have very significant impacts on the public. Given this widespread significance, it is essential that intervention issues be uniformly reviewed under the most appropriate legal standard. This Court can assure that occurrence.

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discretion review and plenary review. This is hardly helpful to their position; rather, it demonstrates that the Third Circuit has only further muddled the analysis. The court specifically stated that it would reverse the district court's decision only if the court "reached a decision we are confident is incorrect." *See* App. 113. Plenary review permits the appellate court to substitute a decision it believes best even if it is not sure that the district court's decision was in error. At best, the Third Circuit applied a clearly erroneous standard of review, *see Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984), and not the searching inquiry conducted under plenary review.

CONCLUSION

For the foregoing reasons, petitioner, Ronald D. Castille, respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

MARTIN HARRIS, *et al.*,
Plaintiffs-Respondents,

v.

IRENE PERNSLEY, *et. al.*,
Defendants-Respondents,

RONALD D. CASTILLE,
District Attorney of Philadelphia County,
Proposed Intervenor-Petitioner.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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HARRIS, Martin a/k/a Carmichael, Arthur, Prison Number 80-16203, Anthony, Albert—# 81-16129, McCrea, Orlando X.—# 81-14560, Moore, Andre—# T-3223, Hansford, Frank L., Jr.—# T-3219 T-3765, Glenn, Tyrone—# 80-11017, Royster, Carlos—# 81-13076, Abdullah, Amin —# 82-00012, Muhammad, Khalid Allah—# 80-08190, Furtick, Arnold—# 80-16429 on behalf of themselves and all other persons similarly situated, Appellants,

v.

Irene PERNSLEY, individually and in her official capacity as Welfare Commissioner of the City of Philadelphia, Royal L. Sims, Rev. Albert Campbell, Labora Bennett, James Barber, Mark Mendel, Donald Padova, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, David S. Owens, individually and in his official capacity as Superintendent of the Philadelphia Prison System, John Daughen, individually and in his official capacity as Warden of Holmesburg Prison, Rodney D. Johnson, individually and in his official capacity as Managing Director of the City of Philadelphia, Hon. William J. Green, individually and in his official capacity as Mayor of the City of Philadelphia, City of Philadelphia, Jay C. Waldman, individually and in his official capacity as General Counsel for the Commonwealth of Pennsylvania, and Ronald J. Marks, individually and in his official capacity as Commissioner of the Pennsylvania Bureau of Corrections, Appellees.

No. 84-1039.

United States Court of Appeals, Third Circuit.

Argued Sept. 10, 1984.

Decided Feb. 22, 1985.

Rehearing and Rehearing In Banc

Denied March 21, 1985.

David Richman (argued), Richard M. Bernstein, Philip H. Lebowitz, Pepper, Hamilton & Scheetz, Philadelphia, Pa., for appellants.

Leroy S. Zimmerman, Atty. Gen., Carl Vaccaro (argued), Deputy Atty. Gen., Philadelphia, Pa., for appellee Marks.

John P. Krill, Deputy General Counsel, Comm. of Pa., Harrisburg, Pa., for appellee Waldman.

Richard J. Gold (argued), Divisional Deputy City Sol., August V. Sellitto, Asst. City Sol., Philadephia, Pa., for appellees Pernsley, Simms, Campbell, Bennett, Barber, Mendel, Padova, Owens, Daughen, Johnson, Green & the City of Philadelphia.

Before GIBBONS and GARTH, Circuit Judges, and TEITELBAUM, District Judge.*

OPINION OF THE COURT

GIBBONS, Circuit Judge:

The plaintiffs, inmates of Philadelphia's Holmesburg Prison, appeal from a judgment dismissing their amended class action complaint, which seeks injunctive relief against that institution as well as money damages for the conditions of confinement in same. The plaintiffs originally filed a *pro se* complaint which was later amended after

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* Hon. Hubert I. Teitelbaum, Chief Judge, United States District Court for the Western District of Pennsylvania, sitting by designation.

the appointment of counsel. The trial court dismissed at the pleading stage because of the possibility of relief under the terms of a judgment rendered in a case pending in the Court of Common Pleas of Philadelphia County. We reverse.

I.

Proceedings in the Trial Court

In February of 1971 five inmates of the Philadelphia Prison System brought on behalf of themselves and others a class action in the Court of Common Pleas seeking equitable relief on federal constitutional grounds. That court found the Philadelphia Prison System to be operating in violation of the eighth amendment prohibition against cruel and unusual punishment. In August of 1973 the Comonwealth Court affirmed that holding but modified the Common Pleas Court order insofar as the earlier order required the appointment of a master to prepare a report and recommendation for the framing of a final decree. *Hendrick v. Jackson,* 10 Pa.Commw. 392, 309 A.2d 187 (1973). The Supreme Court of Pennsylvania, in July of 1974, reinstated the provision in the decree providing for the appointment of a master. *Jackson v. Hendrick,* 457 Pa. 405, 321 A.2d 603 (1974). In March of 1976 the Common Pleas Court issued its first remedial order, which, *inter alia,* established a maximum inmate capacity for the Philadelphia prisons. That limit on inmate capacity, as well as other contested features of the remedial order, was affirmed *per curiam* by the Commonwealth Court in October of 1977. *Hendrick v. Jackson,* No. 1385 C.D.1976 (Pa. Commw. Oct. 17, 1977). The Common Pleas Court retained jurisdiction over the action. Between February 4, 1977 and June 29, 1983 the parties agreed upon a series

of consent decrees dealing with various methods for alleviating the overcrowded conditions of the Philadelphia prisons. The Common Pleas class action did not seek damages, and the remedial decrees made no provision for individual relief for any inmate. The defendants in that action are officials of Philadelphia, not of the Commonwealth. On at least one occasion those Philadelphia defendants were held in contempt, and fined, for failure to comply with various aspects of the consent decree.

In April of 1982 the plaintiffs in the instant case, none of whom were incarcerated before April 1980, filed a *pro se* complaint in federal district court seeking damages and injunctive relief for themselves and for a class consisting of all persons who have been inmates of Holmesburg since that date, and on behalf of future Holmesburg inmates. The amended complaint alleges that since April 30, 1982 members of the class have been deprived of rights guaranteed to them by the eighth and fourteenth amendments, in violation of 42 U.S.C. § 1983 (1982). The amended complaint acknowledges the provisions of the several litigated and consent decrees which have been entered by the Comon Pleas Court, but alleges that those decrees have never been obeyed. Plaintiffs allege, for example, that the Common Pleas decree fixes the maximum capacity of Holmesburg at approximately 700 inmates, but that the current population exceeds 1300. Plaintiffs allege that, as a result of such overcrowding, they have been subjected to and injured by a long list of hazards and deprivations, and have been subject to physical and psychological injury from violent attacks, sexual assault, and threats of physical violence by other inmates. They allege further that each of the defendants, with full knowledge of the ex-

istence of unconstitutional conditions of confinement at Holmesburg, has acted or failed to act in such a way so as to exacerbate the overcrowding and resulting conditions at that institution. The defendants include the Philadelphia officials directly responsible for Holmesburg's operation, as well as two state officials, Jay C. Waldman, General Counsel for the Comonmwealth and Ronald J. Marks, Commissioner of the Pensylvania Bureau of Corrections. The Commonwealth defendants are alleged to be responsible for establishing standards for county jails and prisons, and to have made decisions respecting classification of prisoners which resulted in the overcrowding at Holmesburg.

The Philadelphia and the Comonwealth defendants moved to dismiss under Fed.R.Civ.P. 12(b)(6).[1] The trial

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1. Defendant Marks moved to dismiss for the following reasons:

   1. Plaintiffs' Amended Complaint fails to state a claim against defendant Marks upon which relief can be granted.

   2. Plaintiffs' action against defendant Marks is barred by the eleventh amendment.

   3. The claims for injunctive relief by plaintiffs who are no longer confined to Holmesburg are moot.

   4. Plaintiffs' action is barred by principles of res judicata and collateral estoppel.

   5. Defendant Marks is immune from liability for money damages.

   Defendant Waldman moved to dismiss for the following reasons:

   1. The amended complaint fails to state a claim against defendant Waldman upon which relief can be granted because of lack of specificity.

(Continued on following page)

court granted these motions. The court ruled that as against the Philadelphia defendants both the claims for injunctive relief and for money damages were barred by res judicata, having been merged in and therefore barred by the decrees of the Court of Common Pleas. As to the Commonwealth defendants, who were not parties to the Common Pleas action, the court ruled that all claims against them were barred both by the eleventh amendment and by qualified official immunity. Alternatively, the court ruled that because of the pendency of the state court action it should abstain from adjudicating any aspect of the case and, accordingly, dismissed it entirely.

II.

Res Judicata

As we noted above, the Common Pleas Court action did not litigate any claims for money damages. Nor did it litigate events occurring after April 30, 1982. Thus the Philadelphia defendants do not urge that the plaintiffs

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(Continued from previous page)

2. The action against defendant Waldman is barred by the eleventh amendment to the United States Constitution.

3. The action is barred by principles of res judicata and collateral estoppel.

The Philadelphia defendants also moved to dismiss, but the specific reasons relied upon do not appear in the record before us.

Grounds for dismissal other than those specified in the written motions apparently were addressed at oral argument in the trial court. The record contains no transcript of that argument. Thus we must depend on the trial court's opinion to determine what contentions were made in support of the Rule 12(b)(6) motions.

are collaterally estopped either factually or legally—barred by issue preclusion—because of any detedmination made by the Court of Common Pleas. *See* Restatement (Second) of Judgments § 27 (1982). Indeed, quite the opposite is the case. The present plaintiffs, who were not inmates of Holmesburg at the time of the 1972 litigation, will contend, if the case goes to trial, that the Philadelphia defendants are collaterally estopped from attempting to defend the constitutionality of conditions of confinement at Holmesburg.[2] *See* Restatement (Second) of Judgments § 27 (1982).

What the Philadelphia defendants do urge, however, is that the named plaintiffs in this action and the class members whom they represent are barred by res judicata —claim preclusion—from asserting any claim which might have been asserted in the 1971 Common Pleas case. *See* Restatement (Second) of Judgments §§ 24, 41 (1982).

When determining the judgment preclusion effect of a judgment rendered by a state court, we are referred to the law of the rendering state. 28 U.S.C. § 1738 (1982); *Migra v. Warren City School Dist. Bd. of Educ.*, — U.S. —, 104 S.Ct. 892, 79 L.Ed. 2d 56 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). But while federal courts are directed by statute to look to state law for determination of the judgment preclusive effects of state judgments, state law itself is subject to the limitations of due process. Thus there are due process limitations upon the authority of states to attempt to bind by

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2. The plaintiffs plead that they are entitled to rely upon the decree in the Common Pleas action. Amended Complaint, ¶ 50, App. 36.

judgment non-participants in the underlying state lawsuit. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176, 94 S.Ct. 2140, 2151, 40 L.Ed.2d 732 (1974); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). The position of the Philadelphia defendants is that the 1971 Common Pleas action forever bars claims for injunctive relief and damages, not only by claimants who were inmates in 1971, but also by inmates who did not become so until more than a decade later.

We need not decide whether Pennsylvania law would violate due process should it purport to go that far in applying claim preclusion. Plainly Pensylvania law is not so extreme.

Pennsylvania applies res judicata—claim preclusion—only after a final judgment on the merits. *Bearoff v. Bearoff Bros., Inc.*, 458 Pa. 494, 327 A.2d 72 (1974). Even after judgment, "[i]t is well settled that for the doctrine of res judicata to prevail there must be a concurrence of four conditions: 1) identity of issues, 2) identity of causes of action, 3) identity of persons and parties to the action, and 4) identity of the quality or capacity of the parties suing or sued." *Safeguard Mutual Ins. Co. v. Williams*, 463 Pa. 567, 345 A.2d 664, 668 (1975). We assume arguendo, that despite the retention of jurisdiction by the Common Pleas Court, its liability determination would be treated by Pennsylvania as a final judgment on the merits. It must nevertheless satisfy the conjunctive four factor test quoted above. That test is not satisfied by the Common Pleas Court judgment.

There is no identity of causes of action between the plaintiffs in the 1971 lawsuit and this one. No mem-

ber of the present class even had a cause of action, either for injunctive relief or for damages, growing out of the conditions in Holmesburg in 1971, for no such class member was subjected to those conditions. A Pennsylvania judgment is not conclusive on matters which by reason of the nature of the case could not have been adjudicated. *E.g., Folmar v. Elliot Coal Mining Co.*, 441 Pa. 592, 272 A.2d 910 (1971); *Salay v. Braun*, 427 Pa. 480, 235 A.2d 368 (1967); *Maslo Mfg. Corp. v. Proctor Elec. Co.*, 376 Pa. 553, 103 A.2d 743, *cert. denied*, 348 U.S. 822, 75 S.Ct. 36, 99 L.Ed. 648 (1954). Indeed it could not have been anticipated in 1971 that the class members now before us would ever arrive in Holmesburg. Moreover there was no time at which notice could have been given to them so as to afford current class members an opportunity to assert the claims now claimed by the Philadelphia defendants to be barred. *See Greenfield v. Villager Indus., Inc.*, 483 F.2d 824, 832 (3d Cir. 1973); Restatement (Second) of Judgments § 42(1)(a) (1981). No steps were taken in the Common Pleas Court action to impose on any party in that action the responsibility for discharging fiduciary obligations to unknown potential future inmates. Thus there is no identity of persons or parties between the present class members and the named plaintiffs in the Common Pleas Court action. The Philadelphia defendants have not referred us to any Pennsylvania case suggesting that the Courts of the Commonwealth would apply claim preclusion, on the basis of a 1971 lawsuit, against nonparties, who could not have been notified of its pendency, so as to bar claims for injunctive relief and damages for events occurring over ten years later.

The trial court erred, therefore, in holding that res judicata—claim preclusion—bars the instant action against the Philadelphia defendants.

III.

Eleventh Amendment

The Commonwealth defendants, Waldman and Marks, contend that the action against them for either injunctive relief or damages is barred by the eleventh amendment. The claims asserted against them are predicated upon alleged violations of the Constitution. They are charged with individual acts taken under color of state law. No payments are sought from the Commonwealth Treasury. *Compare Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). No relief is sought against them under state law. *Compare Pennhurst State School & Hospital v. Halderman,* — U.S. —, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). They remain subject to actions for injunctive relief, *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), and to actions for money damages, except to the extent that they may enjoy official immunity.

IV.

Official Immunity

Plaintiffs claim Waldman and Marks made decisions which allegedly contributed to the unconstitutional conditions at Holmesburg. Waldman and Marks are not parties to the action in the Court of Common Pleas, but, according to plaintiffs, have been responsible in part for the failure of that court to achieve compliance with its decree. The trial court accepted their argument that the official im-

munity holding in *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19, 102 S.Ct. 2727, 2737-39, 73 L.Ed.2d 306 (1981) barred the plaintiffs' claim for monetary relief because the complaint did "not contain allegations of sufficient specificity to defeat their qualified immunity as state officials with discretionary powers." App. 18.

The qualified immunity defense only applies, of course, to claims for money damages. The trial court correctly so assumed and relied on different grounds for dismissing the action for injunctive relief against Waldman and Marks. Initially we note that qualified immunity is an affirmative defense. There is no pleading requirement that a plaintiff must anticipate such a defense. Marks and Waldman did not move for summary judgment; thus there is no record on which to judge whether they would be able to place themselves within the doctrine of official immunity.

Judging the complaint by the standard appropriate under Rule 12(b)(6), we must assume that the plaintiffs could prove that Waldman and Marks, while knowing that the overcrowded conditions at Holmesburg had already been adjudicated to be violations of the Constitution, took steps under color of state law which increased the inmate population and aggravated the violations. The acts complained of and the resulting consequences are set out quite specifically. A Rule 12(b)(6) dismissal of the complaint against Waldman and Marks for money damages, therefore, was an error of law.

V.

Abstention

As an alternative justification for dismissing the complaint the trial court relied on what it referred to as "[t]he doctrine of abstention [which] permits a federal court in its discretion to decline or postpone the exercise of its jurisdiction." App. 14. Identifying four categories of cases in which federal courts may decline to exercise jurisdiction, the court held that three were inapplicable, but that the fourth did apply.

First, the trial court noted that under *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) federal courts may postpone adjudication of a federal constitutional issue which may be mooted or presented in a different posture by a state court determination of a state law issue. This ground for declining to exercise jurisdiction was rejected because "there is no pertinent state law which would preclude the need to decide the constitutional issue." App. 14. The defendants point to no potentially preclusive state law issue. Thus we agree with the district court that *Pullman* abstention would have been inappropriate.

Next the court considered whether the exercise of federal court jurisdiction would substantially interfere with a state regulatory scheme dealing with matters of significant importance to the state. *See Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); *Baltimore Bank for Cooperatives v. Farmers Cheese Coop.*, 583 F.2d 104, 109 (3d Cir.1978). The only regulatory scheme to which the defendants could point was the decree

imposed, on federal constitutional grounds, by the Court of Common Pleas. The Court rejected a *Burford*-type abstention, noting that "[t]he administration of the state prison system is of significant importance to the state but there are no state claims made in this case; the court action in *Jackson* was premised on federal not state constitutional rights." App. 15 (footnote omitted). No special competence is claimed for the Court of Common Pleas in the administration of decrees aimed at vindicating violations of federal constitutional rights. Thus we agree that a *Burford* dismissal would have been inappropriate.

The court also considered whether it should decline to exercise jurisdiction on the ground that it would be called on to restrain the enforcement of a state court proceeding in which the state had a significant law enforcement interest. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Noting that "[t]here are no state criminal proceedings or nuisance proceedings antecedent to a criminal proceeding involved here," App. 15, it declined to dismiss on the authority of *Younger v. Harris*. The trial court's holding in this respect complies with the consistent holdings of this court that "where the pending state proceeding is a privately-initiated one, the state's interest in that proceeding is not strong enough to merit *Younger* abstention, for it is no greater than its interest in any other litigation that takes place in its courts." *Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008, 1019 (3d Cir.1981); *See Johnson v. Kelly*, 583 F.2d 1242, 1249 (3d Cir.1978) (abstention improper in a challenge to constitutionality of tax sales of property when state action to quiet title was brought by

private citizens); *New Jersey Educ. Ass'n v. Burke,* 579 F.2d 764, 767 (3d Cir.1978) (abstention improper when private plaintiffs sued state agency in state court). Since the municipal and state officials are defendants in the state proceeding resisting the enforcement of federal constitutional rights, rather than plaintiffs or prosecutors seeking vindication of state law enforcement policies, the trial court did not err in declining to dismiss on the authority of *Younger v. Harris* and its progeny.[3]

Finally, citing *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the trial court identified a fourth category of cases which gave it discretion to decline to exercise jurisdiction for reasons of wise judicial administration when a state court had concurrent jurisdiction over a pending action. App. 15. *See also Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). The court concluded that, in the interest of wise judicial administration, all claims against all parties should be dismissed.

Before addressing the trial court's treatment of *Colorado River,* we note the context in which the ruling was made. We must take as true the allegations of the complaint that conditions in Holmesburg, in 1982 violated the eighth and fourteenth amendments. We must take as

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3. The defendants do not contend that the plaintiffs have failed to exhaust state administrative remedies for prisoner grievances which have been approved by the Attorney General pursuant to the Civil Rights of Institutionalized Persons Act. Pub.L. No. 96-247, § 2, 94 Stat. 349 (1980) (codified at 42 U.S.C. § 1997e(a)(1) (1982)). So far as the record discloses, Pennsylvania has not obtained approval for any such remedies.

true the allegations that a decade-old decree, which put a cap on inmate population, remains unenforced. Moreover, the litigation pending in the Court of Common Pleas is not fully parallel to that brought in the district court, for no claim for money damages was asserted in the state court case. Nor will the federal court case involve parellel litigation even over liability for injunctive relief, since the liability phase of the state court case has long since been concluded. Yet, despite that liability determination, the complaint alleges that inmates placed in Holmesburg since April 30, 1982 continue to suffer injury from ongoing violations of the eighth and fourteenth amendments.

The basic rule has always been that the pendency of a state court proceeding is not a reason for a federal court to decline to exercise jurisdiction established by Congress. *McClellan v. Carland,* 217 U.S. 268, 281-82, 30 S.Ct. 501, 504, 54 L.Ed. 762 (1910). Moreover a state court having jurisdiction over a class action may not enjoin a parallel class action in a federal court. *Donovan v. City of Dallas,* 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964). These holdings recognize the deference which federal courts owe to the legislative deterimnation by Congress that plaintiffs have been given a choice of forums. *See Meredith v. Winter Haven,* 320 U.S. 228, 236, 64 S.Ct. 7, 11, 88 L.Ed. 9 (1943).

The Supreme Court has recognized a narrow exception to the basic rule, where it has been able to identify, in other Congressional legislation, a tempering of the policy of enforcing the plaintiff's choice of a federal forum in favor of a policy of avoiding duplicative and inconvenient litigation. In *Colorado River Water Conservation District*

v. United States, supra, the Court found such a modification in the McCarren Amendment, c. 651, Title II, § 208(a)-(c), 66 Stat. 560 (1952) (codified as 43 U.S.C. § 666 (1982)), in which Congress consented to suit in state courts against the United States when the United States was asserting claims for water rights under a state water rights scheme. The Court held that, in light of the McCarren amendments, deference to a parallel state proceeding was appropriate, since such deference would a) provide a single court with exclusive jurisdiction over interdependent water rights, b) avoid piecemeal litigation, and c) provide for resort to a more convenient forum, one which had first assumed jurisdiction. Even while announcing this narrow parallel litigation exception to the basic rule, however, the Court took pains to note "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id.* 424 U.S. at 817, 96 S.Ct. at 1246, citing *England v. Medical Examiners,* 375 U.S. 411, 415, 84 S.Ct. 461, 464, 11 L.Ed.2d 440 (1964). Under *Colorado River* a district court may dismiss only upon "a carefully considered judgment" which "[o]nly the clearest of justifications will warrant. . . ." 424 U.S. at 818-19, 96 S.Ct. at 1246-47.

> The teaching of the Colorado River case is that only "exceptional" circumstances will permit a federal court to refrain from exercising its jurisdiction for reasons of wise judicial administration due to the presence of a concurrent state court proceeding.

17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4247 (1978) p. 519.

Recently the Supreme Court has reconfirmed that the parallel litigation exception to the basic rule of *McClellan*

v. Carland is a narrow one requiring the clearest justification. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), the Court held that a diversity action to compel arbitration should not have been dismissed in favor of a state court declaratory judgment action in which the federal plaintiff was a defendant. There was no assumption by the state court of control over a *res* or property, and no contention that the federal forum was less convenient to the litigants. *Id.* at 939. Moreover "avoidance of piecemeal litigation, and the order in which jurisdiction was obtained by the concurrent forums—far from supporting the stay, actually counsel against it." *Id.* Addressing a factor not considered in *Colorado River,* the Court held that the existence of a federal law rule of decision, which either court must apply, was a major reason for exercising federal jurisdiction. Justice Brennan wrote:

> [w]e emphasize that our task in cases such as this is not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather, the task is to ascertain whether there exist "exceptional" circumstances, the "clearest of justifications," that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction. Although in some rare circumstances the presence of state-law issues may weigh in favor of that surrender, . . . the presence of federal-law issues must always be a major consideration weighing against surrender.

103 S.Ct. at 942.

The test for application of the parallel litigation exception set forth in *Colorado River* and reiterated in *Moses H. Cone* cannot be satisfied in this instance. The cases are

not truly parallel since the federal court plaintiffs seek money damages while the state court plaintiffs did not. The liability phase of the state court case is long concluded, and thus parallel litigation on liability even for injunctive relief is not an issue. Indeed the plaintiffs may be able to avoid some steps in the federal court proceeding by offensive collateral estoppel use of the state court judgment. The state court is not a more convenient forum since both courts are located in the same city, equally accessible to Holmesburg. No federal statute suggests a congressional policy tempering in any way the basic policy of affording plaintiffs a choice of forum. Finally, of special significance in light of *Moses H. Cone*, the law applied in either forum is federal law. The mere pendency of a state court injunction predicated on federal law, which according to the complaint has not produced an alleviation of ongoing violations of the constitution, is not such an exceptional circumstance as to relieve the federal courts of "the virtually unflagigng obligation . . . to exercise the jurisdiction given them." 424 U.S. at 817, 96 S.Ct. at 1246. Thus we cannot affirm the dismissal of the complaint on the ground relied on by the trial court.

VI.

Conclusion

The judgment dismissing the complaint on the defendants' Rule 12(b)(6) motion will be reversed, and the case remanded for further proceedings.

GARTH, Circuit Judge, dissenting:

The majority, in virtual defiance of Supreme Court teachings that federal courts should not intrude in vital

state interests unless federal constitutional concerns are being violated or ignored—neither of which is the case here—has nevertheless held that a federal court is to manage Philadelphia's jails. It so holds despite admitted record evidence (1) that the Pennsylvania courts have been and are exercising strict supervision over Philadelphia's prison system and conditions and (2) that the Pennsylvania courts are vindicating all federal constitutional rights by appropriate state court actions.

I cannot agree with the majority that the state's interests, which are so very vital in the area of prison administration, must be subordinated to federal court determinations even while the Commonwealth is expending every effort to correct the conditions that have been challenged. I therefore dissent.

I.

My disagreement with the majority is a basic one. I do not believe that Supreme Court teachings, comity, or reason support a federal court's intrusion into a state's administration of its prison system when the state courts have been, and presently are, exercising supervision over these institutions and are doing so in accordance with both state and federal constitutional requirements.

The pleadings clearly reveal that since March 15, 1976 the Court of Common Pleas has not only imposed corrective measures on the Commonwealth's prison administration, but has done so continuously through various consent decrees. As recently as June 22, 1984, additional orders have been entered by the state courts. For a federal court to step in and ignore the state's own corrective proceed-

ings is, so far as I am concerned, as inappropriate and wrong as it is for a federal court to run state hospitals, see *Pennhurst State School & Hospital v. Halderman*, — U.S. —, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984); *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), or schools, see *Williams v. Red Bank Board of Education*, 662 F.2d 1008 (3d Cir.1981). This is so particularly where the state courts have been strictly enforcing federal constitutional mandates. The majority opinion attempts to excuse and explain the federal court's role by focussing on the money damages which these plaintiffs seek. Maj. Op. typescript at 18. I suggest this is a makeweight argument that canont govern the more important and the more sensitive issue of federal and state comity presented by the circumstances of this case.

II.

In February, 1971, five prisoners in the Philadelphia prison system brought a class action in the Court of Common Pleas in Philadelphia County, on behalf of themselves and all others confined in Philadelphia prisons, seeking injunctive relief from prison overcrowding in violation of both state and federal constitutional provisions. The Court of Common Pleas found violations of both the Pennsylvania and United States Constitutions and entered a decree which became final on June 7, 1972. This decree was upheld on appeal. *Jackson v. Hendrick*, 457 Pa. 405, 321 A.2d 603 (1974). The Court of Common Pleas retained jurisdiction over the remedial stage of the case, as it has until this day. The first remedial order was issued on March 15, 1976, establishing maximum prison population limits.

Since then, the parties have entered a series of consent decrees governing administration of the prisons and designed to alleviate the conditions found violative of the eighth amendment of the United States Constitution and Pensylvania constitutional provisions. The most recent such remedial order prior to the district court's dismissal of the instant action was issued on June 29, 1983, and directed a plan of prison release in order to relieve overcrowding.[1]

The plaintiffs in the instant case filed this action in the federal district court for the Eastern District of Pennsylvania on April 27, 1982, seeking relief under 42 U.S.C. § 1983 from prison conditions in the Philadelphia prison system which are alleged to violate the eighth amendment. Class certification was sought for a "class consisting of all persons who have been inmates of Holmesburg Prison since April 30, 1980, and on behalf of all future inmates of Holmesburg Prison." None of the named plaintiffs were incarcerated before April 30, 1980; thus, none of the plaintiffs were prisoners during the time the 1971 action was initiated in state court. Nevertheless, plaintiffs, in their amended complaint, allege that the entire current plaintiff class is included in the 1971 class.

The current class action alleges that conditions in the Philadelphia prison system remain in violation of the

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1. Since this appeal arises from a dismissal by the district court under Fed.R.Civ.P. 12(b)(6), only the facts pleaded up to that time are relevant to disposition of the appeal. We note, however, that the Court of Common Pleas issued remedial orders on April 3, 1984 and June 22, 1984, which are subsequent to the date of the district court's dismissal. The orders established a timetable for construction of new facilities, and provided fines in case of non-compliance.

eighth amendment, primarily due to continued overcrowding and the prison system's failure to comply with the state court's remedial decrees. Damages and injunctive relief were sought against the City of Philadelphia and various City officials in charge of prison administration. Further, damages and injunctive relief were sought against state officials, Waldman and Marks, for their actions certifying the prisons as suitable for prisoners who were sentenced to maximum terms of greater than six months and less than five years.

Both the City and State defendants filed motions to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The district court granted these motions to dismiss on several grounds. First, as to the City defendants, it found that the plaintiff class' claims were barred by the doctrine of res judicata, their claims having been merged into the decrees of the Court of Common Pleas. Second, it held that the doctrine of *Colorado River*[2] abstention was applicable to this case, where resolution of the dispute is primarily committed to the state court. It further decided that such abstention required dismissal of this case. Third, as to the State defendants, the district court found plaintiffs' claims to be barred by both the eleventh amendment protection of state sovereign immunity and qualified official immunity.

I agree with so much of the majority opinion that holds that the prisoners' claims are not barred by res judicata. I also agree with the majority's resolution of the qualified official immunity defense asserted by defendants Marks

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2. *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

and Waldman, and its holding that the brand of abstention announced in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) does not apply to this case. I part company with the majority, however, in its holding that *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) does not authorize abstention in this case. Accordingly, I would remand the case to the district court with instructions to abstain from proceedings with this case, while at the same time retaining jurisdiction should any federal claims remain unresolved by the state court's action.

III.

This court has recently approved a form of *Younger v. Harris* abstention that has the effect of harmonizing both federal and state remedies. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), established a principle of abstention where federal adjudication would disrupt an ongoing state criminal proceeding. In *Moore v. Sims*, 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979), the Supreme Court extended *Younger* abstention to purely civil proceedings, applying the doctrine to bar federal court adjudication of a child custody claim where state court custody proceedings were already in progress. Even though Sims was challenging the procedures used in the state proceedings, the Supreme Court found abstention appropriate:

> The *Younger* doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff. . . . that policy was first articulated with reference to state criminal proceedings, but as we recognized in

> *Huffman v. Pursue, Ltd.*, 420 U.S. 592[95 S.Ct. 1200, 43 L.Ed.2d 482] (1975); the basic concern—that threat to our federal system posed by displacement of state courts by those of the National Government is also fully applicable to civil proceedings in which important state interests are involved.

Id. at 423, 99 S.Ct. at 2377.

This court then applied *Younger* abstention to state administrative proceedings in *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1009 (3d Cir.1981). We have required that *Younger* abstention in such civil proceedings be based on the presence of weighty state interests. *See Williams* at 1017. I can think of no more weighty, vital or intimate state interests than the administration of a state's penological system. Indeed, the Supreme Court has given the federal courts unambiguous instructions to pay great deference to the States' weighty interest in administering their own prison systems. *See generally Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Union County Jail Inmates v. DiBuono*, 713 F.2d 984 (3d Cir. 1983). In light of the Supreme Court's admonitions pertaining to vital state interests, we held in *Williams*, a case which concerned school disciplinary proceedings, that:

> [O]ur analysis and our reading of *Younger* cases impress us that where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests, the district court, pursuant to *Younger*, should abstain.

662 F.2d at 1017.

Williams involved a suit brought in federal court by a school teacher seeking an injunction against further state prosecution of an administrative disciplinary proceeding, expungement of the proceeding from her record, and compensatory and punitive damages. In *Williams*, we upheld so much of the district court's order directing abstention in favor of the pending state administrative proceeding, but we vacated that aspect of its order which dismissed Williams' complaint. Instead we directed the district court to retain jurisdiction pending resolution of the state proceedings in order to provide these remedies, such as constitutional damages, which were available only in the federal action. Recognizing that Williams must seek relief in federal court which was not available to her in State proceedings, we refused to deny a federal court's duty to assume jurisdiction where jurisdiction properly existed. We also recognized, however, that the federal court would find it difficult if not impossible to adjudicate Williams' constitutional claims until after all State proceedings had been finally completed.[3]

In the present case, the courts of Pennsylvania have been overseeing the remedies directed to particular prison

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3. Similarly, in *Scott v. Germano*, 381 U.S. 407, 85 S.Ct. 1525, 14 L.Ed.2d 477 (1965), the district court hearing the *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) voting reappointment case on remand was directed to vacate its judgment and stay its proceedings in order to give pending state court proceedings an opportunity to implement its own remedial plain. See also, *Halderman v. Pennhurst State School and Hospital*, 673 F.2d 647, 662-671 (1983) (Garth, J. concurring) (federal judicial oversight of state remedial plan preferable to appointment of federal master), *rev'd on other grounds*, — U.S. —, 104 S.Ct. 900, 908, 79 L.Ed.2d 67 (1984).

conditions and have been issuing remedial orders since at at least March 15, 1976. They have done so after consideration of prison conditions which were alleged to violate both federal and Pennsylvania constitutions. Thus, the Pennsylvania courts have not only been aware of, but have sought to vindicate, federal concerns. Indeed, the complaint recites that a total of $325,000 in fines has been levied by the court for failure to comply with various corrective provisions of the consent decree which had been entered. The complaint further recites that there have been four additional consent decrees that have been approved by the Court of Common Pleas as late as December 21, 1982. Moreover, as recently as June 29, 1983—more than one year after the present federal action was commenced—the state court entered still another order establishing a plan of prison release to relieve overcrowding. That order was followed by still additional orders entered by the state courts as late as June 22, 1984.

I recognize that *obiter dictum* in prior decisions of this Court has indicated that *Younger* abstention would ordinarily not obtain where the state proceedings were instituted by a private party rather than by the state as sovereign. See *Johnson v. Kelly,* 583 F.2d 1242, 1249 (3d Cir.1978); *New Jersey Education Association v. Burke,* 579 F.2d 764, 767 (3d Cir.1978). Indeed, *Williams* itself repeats that suggestion, and the majority in this case, relying on that *dictum,* thereby rejects *Younger (Williams)* abstention here.

While the statements in *Williams, Kelly* and *Burke* may be said to create a presumtion against a sufficient state interest in the pending proceedings to invoke *Younger*

abstention where the pending proceedings were privately initiated, none of these cases foreclose *Younger* abstention in a case such as this one. *Williams* did not involve privately initiated proceedings. *Kelly* found abstention inappropriate where the state was not a party to the pending proceedings. However, in the instant case, state officers and other governmental parties are actively involved in the suit. In *Burke,* the Court considered the fact that the state proceedings were privately instituted to be *but one of the many factors* mitigating the state's interest in exclusively adjudicating the claims, as weighed against the interest in a federal forum. Thus, the fact that the state did not initiate the instant proceeding is not fatal to the application of the *Williams* abstention doctrine.

Moreover, to put the issue of "private initiation" completely to rest, it must be remembered that the state proceeding was not recently instituted but has long since passed the liability determination and is presently in the enforcement state. As I have noted, the original decree finding liability was entered June 7, 1972, nearly thirteen years ago, and has been followed since then by other decrees and orders of enforcement. Thus, the present nature of the state proceeding is one that has for all practical purposes lost any "privately initiated" character. The Commonwealth seeks no more than to enforce in its own courts, those decrees long since entered by its own courts. Thus, to reject *Wililams* abstention on the ground that it does not apply where the suit has been privately initiated, is to ignore both the jurisprudential and prudential characteristics of the present state proceedings. In the present case, I am entirely satisfied that Pennsylvania's weighty interest in adjudicating through its own courts a broad

remedial program aimed at revamping the Philadelphia prison system more than makes up for the circumstance that the original litigation was instigated by prisoners: the litigation having commenced in 1971 and a liability determination having been entered in 1972.

In such a situation where the state court has exercised continuing supervision over its own orders, and has sought to accommodate federal as well as state concerns, it would be improvident for this court to intrude in the ongoing state court proceedings. By the same token, however, it must be recognized, that if, in the unlikely situation that the conditions of which the prisoners complain are not remedied by the Pennsylvania court, no barrier should exist against the prisoners' seeking relief in federal court. Thus, a retention of jurisdiction and a stay of proceedings by the federal court, in order to give the State Court a reasonable time to implement its decree before the imposition of federal remedies, is as appropriate here as we found it to be in *Williams, supra.*

IV.

Although the prisoners sought a judgment in federal court which would declare the conditions of confinement at Holmesburg Prison to be unconstitutional and sought to enjoin the City defendants from continuing to incarcerate them under unconstitutional conditions, they also sought money damages, costs, and attorneys fees. They sought injunctive relief and money damages against the two state defendants, Waldman and Marks, as well, based upon their actions in certifying the Philadelphia prisons as eligible institutions to receive prisoners. The district court regarded the claims for money damages against the City

defendants as barred by res judicata and *Colorado River* abstention. I agree with the majority's reasoning and holding that the district court erred in applying these doctrines to the circumstances of this case.

I disagree, however, with the majority's view that the claims for money damages counsel against abstention in this case. Although the majority piously looks at the claim for money damages and constructs a theory on which it reverses the district court based on the fact that money damages have been sought, any cursory reading of the Complaint and review of the litigational history reveals that this is by far the most insignificant element of the plaintiff's charge. What the plaintiffs seek here is pure and simple equitable relief and they seek it on federal constitutional grounds. The money damages, as I read the Complaint, are incidental.

Until such time as there has been appropriate enforcement of the Pennsylvania court's orders, it is premature even to consider damages against officials whose activities or responsibilities have been challenged. Thus, this is not a case of parrellel litigation. As the majority points out, the equitable liability has already been determined in the state court (Maj. op. at 346) and it is the enforcement of this liability over which the majority now seeks to assume control.

I am not suggesting for a moment that we decline to exercise jurisdiction. I suggest only that considerations of comity dictate that we withhold our federal hand—while retaining jurisdiction—until the state proceedings have concluded and it is appropriate for federal proceedings to

commence, providing always that the federal claims giving rise to these proceedings have not been resolved.

Because I would hold that is inappropriate for a federal court to intrude at this time in the state proceedings (which involve the same subject matter presented by the prisoners' complaint here, and which proceedings have been ongoing and continuous) it would be inappropriate as well for a federal court to adjudicate the merits of the prisoners' claims against the individual City defendants. If the federal court must bide its time with respect to the merits of constitutional violations which the prisoners assert, it is evident that it must also bide its time with respect to resolving claims against the individual defendants where such damage claims may well be resolved in the pending state action.[4] Thus, to this extent the situation presented here is analogous to the situation which otbained in *Williams v. Red Bank, supra,* where we said,

> [I]t is difficult to see how the federal court could adjudicate Williams' constitutional claims and attorney's fees until after all disciplinary proceedings have been finally completed. How could the damages be calculated, for example, until it is known whether

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4. It is unclear from the record before us whether the prisoners' claims for money damages against the individual City defendants will be resolved in the state proceedings. Counsel for the City of Philadelphia represented at oral argument that earlier such claims have been previously brought and have been resolved by the Court of Common Pleas. If, in fact, such relief is available in the state court, the granting of such relief may very well moot out the concurrent relief sought in this action. If, however, these claims cannot be resolved in state court, resolution of these claims by the federal court at the conclusion of the state proceedings would be appropriate under *Williams v. Red Bank Board of Education,* 662 F.2d 1008 (3d Cir. 1981).

Williams is to be "acquitted," discharged, or suffer a reduction in salary?

So, too, here, it would be exceedingly difficult and, in my opinion, jurisprudentially improper, for the district court to fashion relief for the alleged unconstitutional conditions of Holmesburg prison[5] until the state court has had a reasonable time to implement its remedial decrees.[6]

V.

Within recent weeks, this court has recognized the vital interests that a state has in the administration of its penal system by scheduling a case for in banc consideration where one of the significant issues concerns abstention.

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5. Among other claims, the prisoners charged in paragraph 43 and 44 of their complaint that food was unsanitarily prepared and served; there was a lack of bedding, towels, and toiletries, that there was reduced or inadequate access to recreational facilities, libraries, legal materials, religious services, and telephones; that visitation rights, even of legal counsel, were impaired; and that because of overcrowding prisoners have been subjected to physical attacks, sexual assaults, and psychological injuries. The state defendants have also been charged, in paragraph 54, with having classified the Philadelphia prisons as eligible to receive prisoners notwithstanding the unconstitutional conditions alleged to exist at Holmesburg.

6. I recognize that state proceedings have continued for some years. However, the state courts have not been inattentive to the claims of the prisoners. As I observed earlier in this opinion, remedial orders have been entered both prior and subsequent to the institution of the instant action, e.g., in June 1983, April 1984, and June 1984, see text supra and accompanying note 1. Moreover, the nature of the conditions complained of is such that remedies may require long term supervision. Thus, the record does not disclose either an unwillingness on the part of the state court, nor an inability on its part, to rule on or correct the subject of the prisoners' complaint.

Georgevich v. Strauss, No. 84-5194 (3d Cir. Jan. 9, 1985) (order listing case in banc). *Georgevich* involves the manner in which Pennsylvania may parole its prisoners. The present case involves the administration of prisons and the remedial measures designed to bring the Philadelphia prison system in line with state and federal constitional requirements.

I find no distinction between the importance of the comity issue presented in this case and the importance of the comity issue, which is one of the issues presented in *Georgevich*. In the present case the majority opinion requires that a federal court override a state's enforcement of its own court orders, which orders have as their objective, compliance with the federal, as well as the state, constitutions. I suggest that if *Georgevich* warrants the attention of a full court, even more so does this case.

I would vacate the judgment of the district court and remand with instructions to retain jurisdiction over the proceedings in order to resolve any federal claims remaining at the conclusion of the state action.

HARRIS, Martin a/k/a Carmichael, Arthur Prison Number 8016203, et al., Appellants,

v.

Irene PERNSLEY, individually and in her official capacity as Welfare Commissioner of the City of Philadelphia, et al., Appellees.

No. 84-1039.

United States Court of Appeals, Third Circuit.

March 21, 1985.

SUR PETITION BY MARKS AND WALDMAN FOR REHEARING

Before ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges, and TEITELBAUM, District Judge.*

The petition for rehearing filed by appellees Ronald J. Marks and Jay C. Waldman in the above entitled case having been submitted to the judges who participated in the decision of this court, 755 F.2d 338, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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* Hon. Hubert I. Teitelbaum, Chief Judge, United States District Court for the Western District of Pennsylvania, on panel rehearing only.

Circuit Judges ADAMS, HUNTER, WEIS, GARTH and BECKER would grant the petition for rehearing.

Circuit Judge ADAMS dissents from the denial of the petition for rehearing in banc because he believes that this case raises important questions regarding the scope of the *Younger* abstention doctrine, and because it appears that the state court proceedings involving the Philadelphia County Prison system are being conducted in good faith and with due haste.

SUR PETITION BY CITY APPELLEES FOR REHEARING

The petition for rehearing filed by City Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Circuit Judges ADAMS, HUNTER, WEIS, GARTH and BECKER would grant the petition for rehearing.

Judge Adams dissents from the denial of the petition for rehearing in banc because he believes that this case raises important questions regarding the scope of the *Younger* abstention doctrine, and because it appears that the state court proceedings involving the Philadelphia County prison system are being conducted in good faith and with due haste.

GARTH, Circuit Judge, dissenting from the Court's denial of the City of Philadelphia's Petition for Rehearing:

My dissent from the refusal of the majority to order *Williams v. Red Bank Board of Education*, 662 F.2d 1008, 1009 (3d Cir.1981) abstention was grounded on the principle that Federal courts should not take over, manage and operate city or state prisons when the state courts are enforcing all constitutional—including federal constitutional —requirements. At the time that I dissented from the panel opinion, I wrote:

> I do not believe that Supreme Court teachings, comity, or reason support a federal court's intrusion into a state's administration of its prison system when the state courts have been and presently are, exercising supervision over these institutions and are doing so in accordance with state and federal constitutional requirements.
>
> The pleadings clearly reveal that since March 15, 1976, the Court of Common Pleas has not only imposed corrective measures on the Commonwealth Prison Administration, but has done so continuously through various consent decrees. As recently as June 22, 1984, additional orders have been entered by the state courts. For a federal court to step in and ignore the state's own corrective proceedings is, so far as I am concerned, as inappropriate and wrong as it is for a federal court to run state hospitals, see *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. [900], 908 [79 L.Ed.2d 67] (1984); *Youngberg v. Romeo*, 457 U.S. 307 [102 S.Ct. 2452, 73 L.Ed.2d 28] (1982), or schools, see *Williams v. Red Bank Board of Education*, 662 F.2d 1008, (3d Cir.1981). This is so particularly where the state court's have been strictly enforcing federal constitutional mandates.

The Petition for Rehearing that followed the filing of our opinions in *Harris* pointed out that *Jackson v. Hendrick*, No. 71-2437, slip op., (C.P.Phila. April 7, 1972), which resulted in a consent decree, affirmed by the Pennsylvania Supreme Court, 457 Pa. 405, 321 A.2d 603 (1974), "... was originally brought as a broad challenge to conditions in the Philadelphia prisons, ... including ... overcrowding. ... The case extends to every detention or prison facility within the city ... In recent years, the *Jackson* court has focused intensely on overcrowding.

"The supervision by the *Jackson* court has been active, and has involved not only the court but also the full time work of a master appointed by the court. During 1984, the *Jackson* court has taken the following steps:

> 1. On April 23, 1984, the *Jackson* court ordered an emergency release program and an expanded program of bail review hearings to expedite the release of detainees who do not pose a threat to the community. That same order required the city to construct new prison facilities, including an additional 1200 cells in 1986 and 1987.
>
> 2. On June 22, 1984, the *Jackson* court imposed population caps on the existing Philadelphia prisons effective October 1984 to decrease the prison population from 3600 to 2700 inmates."

City Appellees' Petition for Reconsideration in Banc.

The record before the panel of this court did not disclose the State Court's activities and orders after June, 1984. The Petition for Rehearing now reveals the following:

> On October 11, 1984, after finding that the City was in contempt because the population exceeded the court-

> ordered cap, the state court fined the City in excess of $200,000 per month. In addition, the state court released approximately $300,000 in previously collected fines from the City and established a committee to distribute these funds. The City appealed the June 22, 1984 and the October 11, 1984 orders. On October 17, 1984, the Chief Justice of Pennsylvania Supreme Court issued a stay of these orders pending their appeals. On November 22, 1984, the Pennsylvania Supreme Court assumed plenary jurisdiction of the appeals at the request of the City. The Supreme Court also agreed to consider the legality of the "one man, one cell" rule which underlies all of the *Jackson* court's orders."

Thus, not only have the lower state courts in Pennsylvania been actively engaged in controlling and supervising the prison population and prison conditions of the Philadelphia County prisons, but it now appears that effective November 21, 1984, the Pennsylvania Supreme Court itself has taken over all proceedings filed in such actions. More importantly, the Pennsylvania Supreme Court has directed compliance with court orders concerning: (1) construction of new facilities, (2) population caps, (3) release of prisoners, and (4) conditions of confinement including double and triple celling.

These are the very issues involved in the federal proceeding before us and, as the Petition for Rehearing observes, unless *Williams'* abstention is ordered, the overall state court review of the Philadelphia County prisons will be subject to conflicting and contrary determinations respecting each of these vital state concerns. Accordingly, as a mater of federal court policy, I suggest that the panel majority has erred in its failure to acknowledge considerations of comity due the Commonwealth.

Moreover, as a matter of law, the majority's analysis of the *Williams* abstention doctrine, and its failure to apply *Williams* here, is just plain wrong and indefensible. Perhaps an incorrect analysis which leads to an unhappy result may be overlooked or tolerated in private litigation where the stakes and the property interests are not too high. Where, however, the result of a distorted reading of Supreme Court and Third Circuit precedents leads to the very federal intrusion into state concerns that the Supreme Court and considerations of comity have counseled against, then I suggest we have exceeded our functions by far.

In this case, the Pennsylvania state courts have been overseeing and supervising the Philadelphia County Prisons since 1972. A special master is in place. Fines and other coercive means have been employed to correct a system that, as Chief Justice Nix of the Pennsylvania Supreme Court recently held, "... results from the fact that past successive city administrations have avoided the inevitability of providing additional facilities through rationalization, dilatoriness and procrastination." *Jackson v. Hendrick,* No. 180 E.D.Misc. Docket 1984 (Pa., October 17, 1984).

The attention that has been given to prison problems in Philadelphia County prisons is further evidenced by the observation of Chief Justice Nix of the Pennsylvania Supreme Court that

> ... neither party charges this administration with tactics of such dimensions. Under the present city administration, a new facility of 650 beds is being constructed in the northeast section of Philadelphia. We are advised that the excavation stage of that project

> has been completed. Discussions are being had regarding the establishment of a center city holding and criminal justice center. It has also been agreed that the city is now cooperating in the bail release provisions of earlier orders. Although such efforts show a willingness to comply with the June 22 order in the future, the employment of a leisurely pace in planning and executing these intentions will no longer be tolerated.

Id. Thus in addition to a special master and constant and continuing lower court attention, the Supreme Court of Pennsylvania has now taken charge of this unfortunate situation.

Under these circumstances, I ask the question that the majority has never sought to answer—what more, consistent with Supreme Court precedent and directives, should, or could, a federal district court do, to accomplish what is presently underway in the Philadelphia court system? The question which in my opinion this Court *in banc* should answer is: under *William, supra,* why should not the federal court bide its time until, if ever, it appears that the stringent measures and remedies prescribed by Pennsylvania to vindicate federal court rights, have either failed or are unavailing?

Indeed, in light of the current posture of the orders which have been entered by the Pennsylvania courts, I suggest that this Court *in banc* should also consider: what actions could a federal district court judge possibly take (a) without upsetting and destroying a viable program designed by the state courts to correct the Philadelphia prison conditions and (b) without trespassing on state court directives that are presently in place and in effect.

In my earlier dissenting panel opinion, I referred to the fact that this court has scheduled for a full court hearing another case which concerns abstention and comity considerations. *Georgevich v. Straus,* No. 84-5194 (3d Cir. January 9, 1985) deals with the manner in which Pennsylvania may parole its prisoners. The issue there is an important one, as is the issue here. True, the abstention issue in *Georgevich* differs from the abstention issue in this case. But in both cases comity considerations are involved and are paramount.

I wrote earlier, and I now write again, to urge in light of the recent developments brought to our attention by the Petition for Rehearing and the Pennsylvania Supreme Court's orders, that if *Georgevich* warrants the attention of the full court of the Third Circuit, then even more so does this case. Because a majority of this court has not so voted, I am obliged to dissent from the court's order which denies rehearing.

I would grant the Petition for Rehearin[illegible] the City appellee.

Irene PERNSLEY et al. v. Martin Harris et al.

No. 84-1955.

Case below, 755 F.2d 338; 758 F.2d 83.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Nov. 4, 1985. The motion of respondents for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is denied.

THE CHIEF JUSTICE, dissenting.

For the past nine years, the prison system in Philadelphia has been operating under the supervision of the Court of Common Pleas of Philadelphia County, following that court's finding in 1972 that prison conditions violated both the Pennsylvania Constitution and the Eighth Amendment of the United States Constitution. Since 1976, a full-time, court-appointed Special Master has been in place and numerous remedial orders have been issued, including orders requiring the building of new prison facilities and contempt orders imposing over $500,000 in fines for failure to comply with prior orders. In addition, the parties have entered into consent decrees aimed at controlling the population in the prison system. Beginning in 1984, the Pennsylvania Supreme Court assumed plenary jurisdiction over the entire State proceeding.

The State suit commenced by the filing of a class action in 1971 on behalf of all inmates in the Philadelphia prisons, seeking equitable relief from alleged unconstitutional prison conditions; defendants are officials of Philadelphia. In the case now before us Respondent, an inmate who admits he is a member of the same class represented in the

State action, brought a separate class action in the Eastern District of Pennsylvania on behalf of all persons confined in the Philadelphia prisons; defendants include City and State officials. The federal complaint similarly makes claims like those in the State suit, and asserts that the Philadelphia prisons are overcrowded, thereby violating the Eighth Amendment of the United States Constitution; it seeks extensive injunctive relief and monetary damages under 42 U.S.C. § 1983.

The District Court dismissed the equitable relief claims sought in this second class action on the alternative grounds of *res judicata,* or abstention under the doctrine of *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976); it dismissed the damage claim on grounds of sovereign and qualified official immunity. A divided Court of Appeals for the Third Circuit reversed, rejecting each of the District Court's holdings. 755 F.2d 338. In his dissenting opinion, Judge Garth agreed that while *Colorado River* did not support abstention, *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), mandated it:

> I do not believe that Supreme Court teachings, comity, or reason support a federal court's intrusion into a state's administration of its prison system when the state courts have been, and presently are, exercising supervision over these institutions and are doing so in accordance with both state and federal constitutional requirements. 755 F.2d, at 347.

Rehearing was denied over two dissents. 758 F.2d 83.

Respondents essentially ask the federal courts to duplicate the on-going State court regulation of the Philadelphia prison system. The District Court recognized that

the substantial and ongoing State court proceedings involve an important State interest, namely, the administration of a prison system. The Court of Appeals nevertheless found *Younger* abstention restricted to pending State criminal or quasi-criminal proceedings initiated by the State. Our cases, however, recognize that "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982). See also *Moore v. Sims*, 442 U.S. 415, 423, 99 S.Ct. 2371, 2377, 60 L.Ed.2d 994 (1979) (the *Younger* doctrine is "fully applicable to civil proceedings in which important state interests are involved").

The *Younger* doctrine is rooted in the concept of comity, because

> interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604, 95 S.Ct. 1200, 1208, 43 L.Ed.2d 482 (1975).

There is no question that the State is a party to the ongoing State proceedings and that important State policies are implicated in the management of the county prison system. The State courts continue to exercise comprehensive jurisdiction over the prison system's administration through use of a Special Master, by holding hearings, and by issuing remedial orders and ordering fines. Should the District Court exercise its equitable powers as sought in

this second suit, the Philadelphia prisons may thus become subject to potentially conflicting and contrary determinations as to the appropriate remedy for the alleged unconstitutional conditions. Although plaintiffs here additionally seek damages, there is no bar to the assertion of that claim in the State proceedings. So long as plaintiffs have an opportunity to raise their federal claims in the State action, "[n]o more is required to invoke *Younger* abstention." *Juidice v. Vail*, 430 U.S. 327, 337, 97 S.Ct. 1211, 1218, 51 L.Ed.2d 376 (1977).

I would grant the writ of certiorari and reverse the Court of Appeals judgment.

Justice REHNQUIST and Justice O'CONNOR would grant certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD FURTICK, CHARLES OAKES, EMANUEL GARDNER	)	CIVIL ACTION
v.	)	
IRENE PERNSLEY, individually and in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, GUETON CURIONE, individually and in his official capacity as Warden of Holmesburg Prison, PHILLIP DUKES, individually and in his official capacity as Warden of the Detention Center, JOHN DAUGHEN, individually and in his official capacity as Warden of the House of Corrections, RODNEY D.	)	

JOHNSON, individually, LEO C. BROOKS, individually, JAMES S. WHITE, individually and in his official capacity as Managing Director of the City of Philadelphia, WILLIAM J. GREEN, individually, HON. WILSON GOODE, individually and in his official capacity as Mayor of the City of Philadelphia, CITY OF PHILADELPHIA, JAY C. WALDMAN, individually and in his official capacity as General Counsel for the Commonwealth of Pennsylvania, RONALD J. MARKS, individually, GLEN JEFFES, individually and in his official capacity as Commissioner of the Pennsylvania Department of Corrections	)	NO. 82-1847

ORDER

AND NOW, this 30th day of December, 1986, upon consideration of the Motion of District Attorney Ronald D. Castille to Intervene as a Party Defendant, the memoranda in objection thereto, and for the reasons stated in the foregoing Memorandum, it is ORDERED that said Motion is DENIED.

/s/ Norma L. Shapiro

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD FURTICK, CHARLES OAKES, EMANUEL GARDNER	)	CIVIL ACTION
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MEMORANDUM AND ORDER

NORMA L. SHAPIRO, J. DECEMBER 30, 1986

In this civil rights action concerning conditions of confinement in City of Philadelphia penal institutions, the District Attorney for Philadelphia, Ronald D. Castille, has moved to intervene as a party-defendant. The motion is opposed by the plaintiff-prisoner class and by "the City defendants."[1] Defendants Waldman, Marks, and Jeffes have neither opposed nor supported Mr. Castille's motion. An evidentiary hearing and argument were held on October

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1. The term City defendants refers to all defendants represented by the City Solicitor. The group includes all defendants except Waldman, Marks, and Jeffes.

10, 1986, October 27, 1986, and November 14, 1986.[2] On December 11, 1986, the court stated from the Bench its opinion that the District Attorney was not entitled to intervene as of right and the petition for permissive intervention should not be allowed but that the court would permit the District Attorney to appear and object to the proposed settlement agreement. Accordingly, the motion of the District Attorney is now denied of record for the reasons stated.

This action was commenced by the filing of a *pro se* complaint and request to proceed *in forma pauperis* by ten inmates in Holmesburg Prison on behalf of themselves and all other persons similarly situated. Plaintiffs' action, pursuant to 42 U.S.C.A. § 1983 (West 1981), alleged that the conditions of confinement in Holmesburg Prison violated the Eighth Amendment's prohibition against cruel and unusual punishment. Plaintiffs sued the Commissioner of the Department of Human Services of the City of Philadelphia, the members of the Board of Trustees of the Philadelphia Prison System, the Superintendent of the Philadelphia Prisons, the Warden of Holmesburg Prison, and the Medical Director of the Philadelphia Prisons, in their individual and official capacities. Leave to proceed *in forma pauperis* was granted and coun-

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2. In his supplemental brief in support of motion to intervene, the district attorney, citing Adams v. Baldwin County Board of Education, 628 F.2d 895, 897 (5th Cir. 1980), asserted the right to an evidentiary hearing on the issue of intervention. Under the law of this circuit, the District Attorney was not entitled to such a hearing but nevertheless the court chose to make the factual determination of timeliness on as full a record as possible. This memorandum constitutes any findings of fact and conclusions of law required by this hearing.

sel appointed. Plaintiffs then filed an amended complaint adding as defendants the City of Philadelphia, the Managing Director of the City of Philadelphia, the Mayor of the City of Philadelphia, the Commissioner of the Pennsylvania Bureau of Corrections and General Counsel of the Commonwealth of Pennsylvania, in their individual and official capacities. The Medical Director of the Philadelphia Prisons was dropped as a defendant. All defendants' motions to dismiss were granted on December 30, 1983 on two grounds: res judicata and abstention, both of which were related to litigation pending in the state courts.

In February, 1971, five inmates of the Philadelphia prison system instituted *Jackson v. Hendrick,* a class action in equity in the Court of Common Pleas of Philadelphia County, Pennsylvania, to attack the constitutionality of their conditions of confinement and request injunctive relief against prison and city officials and the City of Philadelphia. On April 7, 1972, a three-judge court held that conditions in the Philadelphia County prisons violated the rights of inmates under, *inter alia,* the United States and Pennsylvania Constitutions; the *decree nisi* appointed a Prison Master to administer the court's corrective decree. On June 7, 1972, the decree became final; it was later affirmed by the Pennsylvania Supreme Court. *Jackson v. Hendrick,* 457 Pa. 405, 321 A.2d 603 (1974). The three-judge state court retained jurisdiction and continued to issue remedial orders and approve consent decrees entered into by the parties.[3] One order established

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3. On January 16, 1987, the Pennsylvania Supreme Court assumed extraordinary jurisdiction and vacated a contempt order against the defendants for failing to comply with pop-

(Continued on following page)

a maximum inmate capacity for the Philadelphia prison system based on "one man-one cell." Nonetheless, plaintiffs contend that unconstitutional conditions persist.

The United States Court of Appeals, reversing the judgment of this court (Opinion of Gibbons, J.; Garth, J., dissenting), held that the Court of Common Pleas' judgment was not res judicata as to the claims made in this action. The court explained:

> There is no identity of causes of action between the plaintiffs in the 1971 lawsuit and this one. No member of the present class even had a cause of action either for injunctive relief or for damages growing out of the conditions in Holmesburg in 1971, for no such class member was subjected to those conditions. A Pennsylvania judgment is not conclusive on matters which by reason of the nature of the case could not have been adjudicated.

Harris v. Pernsley, 755 F.2d 338, 342 (3d Cir. 1984) (citations omitted).

The Court of Appeals also held that because the federal court plaintiffs seek money damages while the state court plaintiffs did not this was not a proper case for abstention under *Colorado River Water Conservation Dis-*

(Continued from previous page)

ulation limits fixed by the three-judge court. In light of Rhodes v. Chapman, 452 U.S. 337 (1981), and statutory repeals, the Pennsylvania Court held that the legal basis for a "one man, one cell" population limit had been eroded and that a fresh consideration of the "totality of the circumstances was required to determine whether conditions of confinement in the Philadelphia prisons are unconstitutional." Jackson v. Hendrick, 509 Pa. 456, 470, 503 A.2d 400, 407-08 (1986).

trict v. United States, 424 U.S. 800 (1976). *Harris,* 755 F.2d at 346. The court stated,

> The mere pendency of a state court injunction predicated on federal law, which according to the complaint has not produced an alleviation of ongoing violations of the Constitution, is not such an exceptional circumstance as to relieve the federal courts of 'the virtually unflagging obligation . . . to exercise the jurisdiction given them.'

755 F.2d at 345 (quoting *Colorado River,* 424 U.S. at 817).

Petitions for rehearing were denied on March 21, 1985. *Harris v. Pernsley,* 758 F.2d 83 (3d Cir. 1985) (Judges Adams, Hunter, Weis, Garth, and Becker would have granted the petition for rehearing). *Id.* Defendants petitioned the United States Supreme Court for a writ of certiorari; the petition was denied on November 4, 1985. — U.S. —, 106 S.Ct. 331, 88 L.Ed.2d 314 (1985) (Justices Rehnquist and O'Connor would have granted certiorari; Chief Justice Burger dissented from the denial of the writ). *Id.*

Following remand, the trial court granted leave to file a second amended complaint in order to provide adequate class representation. Plaintiffs filed a second amended complaint on behalf of an expanded class of prisoners in all Philadelphia prisons and added the wardens of the Detention Center and the House of Corrections as party defendants in their individual and official capacities. The plaintiffs and City defendants also began negotiations for settlement of both the state and federal litigation. This court was informed on August 8, 1986, that a proposed settlement had been reached. A preliminary hearing on approval of the settlement was then scheduled.

On August 19, 1986, District Attorney Ronald E. [sic] Castille moved to intervene as a party defendant, pursuant to Fed.R.Civ.P. 24. Mr. Castille sought intervention as of right pursuant to Fed.R.Civ.P. 24(a) or, in the alternative, permissive intervention pursuant to Fed.R.Civ.P. 24(b) in order to oppose the settlement.

I. *Intervention As Of Right*

Federal Rule of Civil Procedure 24(a) provides in pertinent part as follows:

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In *Pennsylvania v. Rizzo,* 530 F.2d 501 (3d Cir.), *cert. denied,* 426 U.S. 921 (1976), the Third Circuit enumerated three distinct criteria that a putative intervenor is required to establish: (1) his application is timely, (2) he has a sufficient interest in the matter and his interest would be affected by the disposition, and (3) his interest is not adequately represented by the existing parties. *Id.* at 540.

Before addressing the sufficiency of the interest or the adequacy of representation, there must be a determination of timeliness. *See Donovan v. United Steelworkers,* 721 F.2d 126, 127 (3d Cir. 1983), *cert. denied,* 467 U.S. 1252 (1984).

The district court must examine all the circumstances, *see NAACP v. New York,* 413 U.S. 345, 366 (1973), in-

cluding the stage of the proceedings, the prejudice caused to existing parties by delay in seeking intervention and the reasons for the delay. *See Rizzo,* 530 F.2d at 507 (citing *Nevilles v. EEOC,* 511 F.2d 303, 305 (8th Cir. 1975)). Although determining the scope of a putative intervenor's interest may require inquiry into state law, "the timing and manner of intervention is purely a matter of federal law." *Olden v. Hagerstown Cash Register, Inc.,* 619 F.2d 271, 274 (3d Cir. 1980).

The District Attorney contends that timeliness should be measured from the moment he first "officially learned" of the proposed settlement agreement from the City defendants. The City defendants and plaintiffs assert that timeliness should be measured from the time the lawsuit was filed. However, "in considering timeliness the beginning point should be the stage when inadequate representations become apparent." *National Wildlife Federation v. Gorsuch,* 744 F.2d 963, 970 (3d Cir. 1984) (citing *Legal Aid Society of Alameda v. Dunlop,* 618 F.2d 48 (9th Cir. 1980)).

The court does not believe that there has ever been inadequate representation of any proper interest of the District Attorney, but for the purpose of determining timeliness, the court accepts the District Attorney's contention that during settlement negotiations the City Solicitor's interests and actions have been adverse to the interest of the District Attorney in prosecuting criminal cases.

The District Attorney agrees that earlier in this litigation the City Solicitor's office was adequately representing his interest. The City Solicitor's actions were

those that the District Attorney himself would have taken when attempting to have the action dismissed. The District Attorney concedes that as long as the City Solicitor's office was attempting to have the case dismissed, he would not have had standing to intervene.

The District Attorney asserts that he officially learned of the City Solicitor's intent to enter into a consent order on August 12, 1986. His motion to intervene was filed one week thereafter. However, the District Attorney was not entitled to wait for "official notification" of a proposed settlement to attempt to intervene because he does not like it. He was required to move to intervene as soon as he knew or should have known that his interests were no longer adequately protected. *See In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 500 (3d Cir. 1982); *Dodson v. Salvitti*, 77 F.R.D. 674 (E.D. Pa. 1977).

As in *Dodson*, the putative intervenor knew or should have know from the time this litigation was commenced that the ultimate disposition of these proceedings might well affect the interests which they now seek to protect." *Id.* at 677. Therefore, the District Attorney was under a duty to monitor the litigation and move promptly to intervene upon discovering that his interests might no longer be protected. The City Solicitor's settlement posture which displeased the District Attorney could not have come as a surprise. The District Attorney voiced similar objections to the City Solicitor's activities in attempting to settle the *Jackson v. Hendrick* litigation. As soon as the District Attorney knew or should have known of this litigation, he had an obligation to make sure that his interests continued to be protected.

The District Attorney knew or had reason to know of this litigation long before August 16, 1986, when the District Attorney had "official knowledge" of the proposed settlement. At the time this action was filed the District Attorney was following the *Jackson v. Hendrick* litigation closely. Indeed, the District Attorney had attempted to intervene in *Jackson* on March 27, 1981, because of disagreement with the City's posture in that case. The court finds that it is highly unlikely that the District Attorney's office had no knowledge of this related litigation when it was instituted.

The District Attorney of Philadelphia, as all lawyers in this Circuit, is expected to read decisions of the United States Supreme Court and those of the Court of Appeals for the Third Circuit, at the very least those pertaining to the areas of his sworn desponsibilities.[4] Both Mr. Castille and former District Attorney Edward G. Rendell testified that they had not in fact read any of the opinions in this litigation. However, former Deputy District Attorney Eric B. Henson testified that he had read the opinion of the United States Court of Appeals for the Third Circuit reversing this court's dismissal of the action. Notwithstanding the Deputy District Attorney's failure to discuss it with the District Attorney, the District Attorney is charged wih notice of the litigation and the need to protect his interest at least from that time forward. The rea-

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4. Canon 6 of the Pennsylvania Code of Professional Responsibility states, "A lawyer should represent a client competently." 42 Pa.C.S.A. (Purdon 1975). "A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments. . . ." EC 6-2.

sons for his failure to communicate this information to then District Attorney Rendell are irrelevant. The District Attorney must be charged with knowledge of this litigation no later than March, 1985.

The City Solicitor's office petitioned for a writ of certiorari and was continuing to protect the interest of the District Attorney. However, on the date of the denial of the writ, the District Attorney knew or should have known that efforts to obtain dismissal had failed and settlement negotiations were likely. Upon denial of the writ of certiorari the District Attorney was required to move promptly to intervene if he wanted to be a party to this action. But he failed to "take the necessary steps in [his] own behalf." *In re Fine Paper Antitrust Litigation,* 695 F.2d at 501. Instead, the District Attorney waited until the parties were near settlement and then attempted to intervene only to interfere with the settlement. The District Attorney's motion to intervene comes too late in these proceedings. *Accord Dodson,* 77 F.R.D. at 677.

The court must next inquire whether the delay in intervention has prejudiced existing parties. *See Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania,* 674 F.2d 970 (3d Cir. 1982); *Rizzo,* 530 F.2d at 506. Here, the prejudice resulting from the delay is great. The parties have invested a great amount of time and effort in reaching a settlement. They have arrived at two agreements, the first of which was abandoned because of the District Attorney's objections. Had the District Attorney moved to intervene promptly as a party to the settlement negotiations, he could have made his opposition to settlement clear. Then, the time and energy devoted to settlement negotiations might have been in-

vested in preparing the case for trial; indeed, the case might already have been tried. Intervention now will only delay the litigation further and force plaintiffs to endure confinement under allegedly unconstitutional conditions for a greater period of time. The public interest as well as the plaintiffs' interest required prompt disposition of this litigation following its remand to this court.

Other than lack of "official knowledge," the District Attorney has not presented any reason for waiting ten months after the denial of the writ of certiorari to file a motion for intervention. Because the court has already found that the District Attorney was charged with knowledge of the litigation during that period, the delay is inexcusable. *Cf. Rizzo*, 530 F.2d at 507 (reasons for delay inadequate where no concealment of progress of highly publicized litigation). The District Attorney chose to ignore this litigation until he was "officially" informed that a consent decree had been proposed. The decision to do so was a tactical decision that cannot excuse the delay. *See Donovan v. United Steelworkers of America, AFL-CIO*, 721 F.2d 126, 127 (3d Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984).

In summary, the court finds that the District Attorney's motion must be denied as untimely because it comes far too late in the proceedings, delay in filing the motion would prejudice the existing parties and there is no adequate reason for the delay. The application to intervene is therefore denied as untimely.

But the question whether untimeliness alone is always sufficient reason to reject an intervention application is open in the Third Circuit. *See Hoots v. Commonwealth*,

672 F.2d 1133, 1135 n.2 (3d Cir. 1982). Therefore, the court also considered whether the District Attorney meets the other criteria for intervention as of right and permissive intervention.

Federal Rule of Civil Procedure 24(a)(2) requires that an intervenor possess "an interest relating to the property or transaction which is the subject of the action and [that] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . . ." The Supreme Court emphasized in *Donaldson v. United States,* 400 U.S. 517 (1971), that the interest must be a "significantly protectable" one. 400 U.S. at 531.

In determining whether the putative intervenor has a "direct, substantial, legally protectable interest in the proceedings," *Dodson,* 77 F.R.D. at 676 (quoting *Hobson v. Hansen,* 44 F.R.D. 18, 24 (D.D.C. 1968)), the complaint determines the subject matter of the action. *See id.; East Powelton Concerned Residents v. United States Dept. of Housing,* 69 F.R.D. 392 (E.D. Pa. 1975); *see also Alston v. Coughlin,* 109 F.R.D. 609, 613 (S.D.N.Y. 1986) (guards' union denied right to intervene in suit alleging unconstitutional conditions of confinement because only overcrowding and unsafe conditions rather than defects in guard assignment procedure alleged). Plaintiffs complaint alleges that the conditions of their confinement violate the Eighth Amendment's prohibition against cruel and unusual punishment.

The District Attorney has asserted an interest in enforcing the criminal law and a related interest in protecting the public safety. To determine the interest of the Dis-

trict Attorney in this litigation, the court must look to state law. *See Olden,* 619 F.2d at 274. Under the relevant statutes and case law as well as the evidence herein, the District Attorney has no legally cognizable interest in the conditions of confinement in Holmesburg Prison or any other part of the Philadelphia prison system.

Statutory authority to run the Philadelphia prison system is vested in the Board of Trustees of Philadelphia Prisons. 351 Pa. Code § 5.5-701. The Department of Human Services of the City of Philadelphia has general supervisory powers over all city correctional facilities. The General Counsel for the Commonwealth of Pennsylvania and the Commissioner of the Pennsylvania Bureau of Corrections have responsibilities that affect the conditions of confinement in the Philadelphia prisons. The District Attorney for Philadelphia does not.

Under Pennsylvania law, the right of the District Attorney to intervene and his joinder in the related state court litigation have been denied by the Pennsylvania courts. The denial of the right to intervene was based on a lack of timeliness, *see Jackson v. Hendrick,* 498 Pa. 270, 446 A.2d 226 (1982), but the denial of joinder was on substantive grounds, *see Jackson v. Hendrick,* 72 Pa. Cmwlth. 63, 70, 456 A.2d 229, 232-33 (1983). The Pennsylvania Commonwealth Court noted the related state action "is not about . . . the conduct of the District Attorney in carrying out his prosecutorial function. It seeks rather a remedy from unconstitutional prison conditions for which the District Attorney has no responsibility." *Id.* Therefore, state law is clear that the District Attorney has no direct interest in this litigation.

Plaintiffs are strongly opposed to the District Attorney's motion to intervene. Plaintiffs seek no relief against the District Attorney. Counsel for plaintiffs stated in oral argument that he did not know how he would proceed against the District Attorney as a defendant other than to move for his dismissal if intervention were granted, settlement disapproved and the litigation continued.

It is clear that the District Attorney has "the power—and the duty—to represent the Commonwealth's interest in the enforcement of its criminal laws." *Commonwealth ex rel. Specter v. Bauer,* 437 Pa. 37, 41, 261 A.2d 573, 575 (1970). It is equally clear that under Pennsylvania law the City Solicitor's office does not have the power or the duty to represent the District Attorney in federal litigation concerning the enforcement of the Commonwealth's penal statutes. But the enforcement of the Commonwealth's penal statutes is not here at issue. While the final disposition of this action—either by settlement or by injunctive relief granted after a finding of unconstitutional conditions—could have some effect on the District Attorney's enforcement function,[5] it is not the kind of direct, substantial interest that permits intervention as of right. *See Donaldson,* 400 U.S. at 531.

Nor is the District Attorney's purported interest in protecting the public safety of the citizens of Philadelphia and the Commonwealth the kind of direct interest required by *Donaldson.* Many agencies of government at the fed-

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5. From the evidence adduced at the hearing, the court is not convinced that the effect of imposing population caps on the district attorney's enforcement function would be significant.

eral, state, and municipal levels are charged with protecting some aspect of public safety. This alone does not entitle them to intervene in any legal action they believe might adversely affect the public interest. A governmental entity has the right to intervene only to protect a *direct* interest; a view that only the District Attorney can or will protect the public safety is inaccurate and insufficient.

Intervention as of right requires that the purported interest of the District Attorney not be adequately represented by the existing parties. *See McClune v. Shamah*, 593 F.2d 482 (3d Cir. 1979); *Pennsylvania v. Rizzo*, 530 F.2d at 540; *see also Hoots*, 672 F.2d at 1135. The burden of showing inadequate representation, although a minimal one, *see Trbovich v. United States*, 404 U.S. 528, 538 n.10 (1978), is on the putative intervenor, *see, e.g., Hoots*, 672 F.2d at 1135.

In his motion to intervene, the District Attorney expresses concern over the effects of the proposed consent decree on his ability to carry out his prosecutorial function effectively. The court finds that the City defendants are adequately representing any proper interest of the District Attorney in this litigation.

In *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, the Third Circuit stated, "[r]epresentation is generally considered adequate if no collusion is shown between the representative and an opposing party, if the representative does not represent an interest adverse to the proposed intervenor and if the representative has been diligent in prosecuting the litigation." 674 F.2d at 973 (citing *Olden*, 619 F.2d at 274-75; *Martin v. Kalvor Corp.*, 411 F.2d 552, 553 (5th Cir. 1969)).

The District Attorney has failed to meet his burden of proving that no existing party adequately represents his interest. *See Trbovich*, 404 U.S. at 538 n.10; *Hoots*, 672 F.2d at 1135. The District Attorney has neither alleged nor shown collusion between the City defendants and plaintiffs or any failure to prosecute diligently. In addition, he has failed to show that the City defendants' interests are adverse.

The District Attorney based his assertion of inadequate representation primarily on agreement by the City defendants to the first proposed consent order. The District Attorney complained of the "mechanical timetables to be implemented by the consent decree," *see* Brief in Support at 7, to rights accorded to criminal defendants and limitations imposed on the District Attorney in criminal prosecutions, *see id.* at 8. Since the filing of the motion to intervene, proposed consent order No. 1 has been withdrawn by the parties. Upon withdrawing proposed consent order No. 1, the city defendants and plaintiffs informed the court that the settlement agreement had been renegotiated in large part because of the objections of the District Attorney. This suggests that the concerns of the District Attorney have been considered by the City defendants.

The renegotiation of the settlement agreement rendered moot many of the District Attorney's concerns. In consulting the District Attorney and modifying the agreement in view of his concerns, the City defendants demonstrated that their interest was not adverse to that of the District Attorney. Clearly, the City defendants recognized their need to work with the District Attorney to achieve an enforceable settlement.

The proposed revised settlement agreement presented to the court for approval pursuant to Fed.R.Civ.P. 23(e) sets a maximum allowable population in each of the Philadelphia prisons. By its terms it does not implicate the District Attorney's prosecutorial function in any way. While the court recognizes that prison officials would find it easier to comply with the prison population limits if there were more speedy trials for the pretrial detainees who are the overwhelming majority of those incarcerated in City prisons, caps on prison population can be reached in ways that would not interfere with the prosecutorial function. The City defendants will have a choice of methods to bring the prison population into conformance with the agreed upon limitations under the proposed agreement. The City may build additional prisons or convince the judiciary that more convicted defendants should serve their sentences in state institutions. The District Attorney fears release of pretrial detainees the District Attorney considers a risk to the community or unlikely to appear for trial. However, the settlement agreement provides that persons charged with or convicted of murder, forcible rape, or a crime involving the use of a gun or knife in the commission of an aggravated assault or robbery may be admitted to the City prisons even if the population caps are exceeded; there is no provision in the settlement agreement for the release of any prisoners. The City defendants' behavior during the negotiations demonstrates that the City defendants are adequately representing any legally cognizable interest of the District Attorney in this litigation.

Because the District Attorney has met none of the three criteria required for intervention as of right, the motion to intervene as of right will be denied.

II. *Permissive Intervention*

The District Attorney requests that if intervention as of right is denied he be granted permission to intervene pursuant to Fed.R.Civ.P. 24(b). Rule 24(b) provides *inter alia*:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) upon an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed.R.Civ.P. 24(b). Timeliness and the existence of common questions of law or fact must inform the court's exercise of discretion in permitting intervention. *See McKay v. Heyison,* 614 F.2d 899, 906 (3d Cir. 1980).

The District Attorney's application for permissive intervention must also be timely. *See In re Fine Paper Antitrust Litigation,* 695 F.2d 494 (3d Cir. 1982) ("An application to intervene, whether of right or by permission, must be timely under the terms of Rule 24."). The court has already found this application to intervene untimely. Therefore, it has no discretion to grant the District Attorney's application to intervene as a party-defendant.

Federal Rule of Civil Procedure Rule 24(b) allows other than statutory permissive intervention only "when an applicant's claim or defense and the main action have a question of law or fact in common." Fed.R.Civ.P. 24(b).

The District Attorney's proposed answer to plaintiffs' second amended complaint and proposed cross-claim against the City defendants presents some common ques-

tions of law or fact between the present action against the City defendants by a plaintiff class that includes pretrial detainees and the proposed cross-claim by the District Attorney against officials of the City of Philadelphia for infringing upon the prosecutorial function. However, the "common questions" relate only to remedies. There is no issue of law or fact relevant to liability common to the present action and any claim or defense of the District Attorney. Because the District Attorney has no responsibility for the conditions of confinement in the Philadelphia prison system, the common issues are not sufficiently related to the litigation the plaintiffs intended to pursue if the settlement were not approved. Indeed, the District Attorney has shown no interest in intervening if the litigation continues. It is the parties' proposal to settle that has led to the District Attorney's interest in intervention as it is the settlement to which the District Attorney objects.

The court finds that permitting intervention would cause both undue delay and prejudice to the original parties. This action may have reached its conclusion. The parties have reached a settlement and moved for its approval pursuant to Fed.R.Civ.P. 23(e). If the motion to intervene is granted and if the court chooses not to allow settlement of the action, the parties will be forced to litigate. Extensive discovery may be required. If the District Attorney's motion is granted, the City defendants intend to move for joinder of the state courts and/or its judges. The litigation that would ensue would be lengthy, expensive and burdensome.

Prejudice would result to the plaintiffs because they would be forced to endure allegedly unconstitutional con-

ditions for a much longer period of time. Prejudice would also result to existing defendants who have by negotiating a settlement limited their liability for compensatory damages where the exposure was great and also limited liability for attorneys' fees. Not only would they be unable to enter into the settlement they have negotiated, but they, not the District Attorney, will be exposed to far greater liability for compensatory damages and attorneys' fees pursuant to 42 U.S.C.A. § 1988 (West 1981). While not admitting liability, the present defendants wish to devote money and personnel to improving conditions within the prisons rather than continuing to defend this lawsuit. Without sharing any of the increased exposure to liability litigation rather than settlement entails, the District Attorney seeks to intervene only to prevent this settlement.

The court does not believe that granting the District Attorney the status of a party-defendant would allow a fuller or fairer resolution of the issues. Allowing the District Attorney to intervene would not paint "a fuller picture of the conditions [at issue]," *Christy v. Hammel,* 87 F.R.D. 381, 395 (W.D. Pa. 1985), because the District Attorney has no control over those conditions. Despite the untimeliness of the District Attorney's motion for intervention and the peripheral nature of his interest his objections to the proposed settlement have been stated on the record for the consideration of the court with the consent of the parties. The District Attorney has been accorded the right to appear and be heard in opposition to the settlement. *Cf. Kirkland v. New York State Department of Correctional Services,* 711 F.2d 1117 (2d Cir. 1983), *cert. denied,* 465 U.S. 1005 (1984) (approving district court's grant of intervention for sole purpose of objecting

to the settlement). The court believes this statement of objections to the settlement agreement was adequate for the District Attorney to preserve his interest in this litigation. The District Attorney has voiced his concerns with the settlement agreement; however, the District Attorney's consent to the settlement is not required, *see Kirkland,* 711 F.2d at 1125-28, nor would he have standing to appeal the approval or disapproval of the settlement, *see Boston Tow Boat Co. v. United States,* 321 U.S. 632 (1944) (denying intervenor right to take independent appeal).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD FURTICK, CHARLES OAKES, EMANUEL GARDNER	)	CIVIL ACTION
v.	)	
IRENE PERNSLEY, individually and in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, GUETON CURIONE, individually and in his official capacity as Warden of Holmesburg Prison, PHILLIP DUKES, individually and in his official capacity as Warden of the Detention Center, JOHN DAUGHEN, individually and in his official capacity as Warden of the House of	)	

Corrections, RODNEY D. JOHNSON, individually, LEO C. BROOKS, individually, JAMES S. WHITE, individually and in his official capacity as Managing Director of the City of Philadelphia, WILLIAM J. GREEN, individually, HON. WILSON GOODE, individually and in his official capacity as Mayor of the City of Philadelphia, CITY OF PHILADELPHIA, JAY C. WALDMAN, individually and in his official capacity as General Counsel for the Commonwealth of Pennsylvania, RONALD J. MARKS, individually, GLEN JEFFES, individually and in his official capacity as Commissioner of the Pennsylvania Department of Corrections	)	NO. 82-1847

ORDER

AND NOW, this 30th day of December, 1986, upon consideration of the Settlement Agreement entered into by Plaintiffs and all Defendants except Waldman, Marks and Jeffes (settling defendants hereinafter referred to as "City Defendants"), the factual record developed by stipulation and affidavits of counsel, the Court's own inspection of the prisons, and argument of counsel, the Court finds and concludes as follows:

1. The criteria for certification of a class action under Fed.R.Civ.P. 23(b)(2) are met by the proposed class. In particular, named Plaintiffs are adequate representatives of the class and are represented by able and exprienced counsel.

2. The conditions of confinement in the Philadelphia Prison System (consisting of Holmesburg Prison, the House of Corrections, the Detention Center, Women's Modular Units, Laurel Hall, the Cannery, YMCA, Philadelphia Industrial Correction Center (PICC), and the downtown facility to be built and operated by the City of Philadelphia) have improved in various ways since those conditions were adjudged unconstitutional by the Philadelphia Court of Common Pleas in 1972. Gains have been made in the areas of nutrition, health, drug and alcohol treatment, maintenance, social work, education, vocational training and visitation; the City's operating and capital budgets have been increased significantly.

3. There is nevertheless a need for additional improvements in many areas, particularly those where even improved conditions of confinement are impaired by overcrowding. For example, intake procedures, maintenance, kitchen and dining facilities, sick call capabilities and educational, vocational and recreational opportunities are all impaired by overcrowding.

4. The current population of the Philadelphia Prison System is approximately 4300 inmates, including 250 inmates housed in the partially completed PICC.

5. The Settlement Agreement between the City Defendants and Plaintiffs contemplates a system-wide maximum population of 3750, with PICC fully operational and housing 850 inmates.

6. The Settlement Agreement will result in a significant overall reduction in the current prison population and a reduction in double-celling throughout the Philadelphia Prison System.

7. The City Defendants have also agreed to propose the entry of an order in the *Jackson v. Hendrick* proceeding to address conditions of confinement other than overcrowding.

8. There is a risk that Plaintiffs could not succeed at trial in demonstrating that the conditions of confinement in the Philadelphia Prison System are unconstitutional such that any relief is warranted.

9. There is a further risk that the Court would not permit Plaintiffs to litigate the conditions in the entire Philadelphia Prison System--as opposed to Holmesburg Prison only--making it unlikely that Plaintiffs could achieve the system-wide relief accomplished through the settlement now proposed by the parties.

10. Settlement of this matter now provides immediate relief to Plaintiffs prior to taking costly discovery. Trial on the merits of this matter would be lengthy and subject to appeal, and would greatly delay any relief to which Plaintiffs ultimately may be entitled.

11. The City Defendants have litigated this matter vigorously, and the proposed settlement appears to be the result of arm's length bargaining.

12. Appropriate notice having been given to members of the class in the most feasible manner and the proposed settlement being in the interest of the class Plaintiffs, it is accordingly hereby approved by the Court in accordance with Rule 23(e) of the Federal Rules of Civil Procedure.

13. An opinion detailing the reasons for the Court's approval of the settlement will be filed forthwith.

THEREFORE, it is hereby ORDERED AND DECREED as follows:

1. A Plaintiff class shall be certified in this matter, pursuant to Fed.R.Civ.P. 23(b)(2), to include all persons who are, or who have been, inmates of the Philadelphia Prison System since April 30, 1980, and all persons who shall be inmates of the Philadelphia Prison System in the future during such time as this Court retains jurisdiction of this matter.

2. The City Defendants shall adopt and implement the following procedures and policies to reduce the population of the Philadelphia Prison System and maintain the population at agreed-upon levels:

a. Before admission to the Philadelphia Prison System, all defendants in criminal proceedings shall be held at the Police Administration Building for at least four (4) hours from the time of their preliminary arraignment to enable said persons to post bail. Those defendants with bail of $1,500.00 or less shall be held at the Police Administration Building for at least six (6) hours from the time of their preliminary arraignment to enable said persons to post bail.

b. At no time shall more than two inmates be housed in a cell in the Philadelphia Prison System.

c. Every inmate shall be assigned to a long-term housing area within seventy-two (72) hours of arrival in the Philadelphia Prison System. Housing areas shall not include any gymnasium, corridor or bench area, or any area not set up for permanent housing. Every inmate shall receive a mattress by the first night after arrival and a bed and mattress within twenty-four (24) hours of arrival. Until his or her assignment to a housing area, each inmate shall remain in designated intake areas and shall receive proper bedding in accordance with this provision.

d. City Defendants shall complete construction of the Philadelphia Industrial Correction Center, with at least 650 cells, which shall be occupied by December 15, 1986.

e. City Defendants shall construct a downtown detention facility, with at least 440 beds, which shall be occupied by December 31, 1990.

f. The population of the Philadelphia Prison System shall not exceed the following levels:

As of March 9, 1987 — 4,100 inmates

As of May 11, 1987 — 3,950 inmates

As of July 13, 1987 — 3,750 inmates

Thereafter, the prison population shall not exceed 3,750 until the opening of the downtown detention facility. All population levels established by this subsection shall be referred to hereafter as "the maximum allowable population."

g. On and after July 13, 1987, the population of the respective individual facilities within the Philadelphia Prison system shall not exceed the following levels:

Detention Center	—	750 inmates
Holmesburg	—	800 inmates
House of Correction	—	900 inmates
Women's Modular Units	—	200 inmates
Laurel Hall, Cannery & YMCA	—	250 inmates
Philadelphia Industrial Correction Center	—	850 inmates
TOTAL		3,750 inmates

h. No federal or state prisoners, other than inmates detained for immediate court appearances, shall be housed within the Philadelphia Prison System,

except for those federal prisoners in the custody of the United States Marshal. Said federal prisoners may be housed pursuant to the contract between the City of Philadelphia and the United States Marshal.

i. City Defendants shall, on a weekly basis, provide counsel for Plaintiffs with daily population figures for each of the facilities within the Philadelphia Prison System.

3. The Court recognizes that the prison population fluctuates on a daily basis; therefore, the maximum allowable population of the Philadelphia Prison System or of any individual facility may be exceeded temporarily, but never for more than seven (7) consecutive days or for more than twenty (20) out of any forty (40) days.

4. If the population of one or more of the individual facilities within the Philadelphia Prison System exceeds the maximum allowable population as set forth in Paragraphs 2 and 3 of this Order, the City Defendants shall seek the release, through the mechanism of the Bail Master appointed by the *Jackson* court or otherwise, of persons being held either on the lowest bail or persons sentenced to the Philadelphia prisons with less than sixty (60) days remaining to serve on their sentences. Such releases shall continue until the maximum allowable population is achieved or restored. City Defendants agree not to seek the release of any person charged with, or convicted of, murder or forcible rape; City Defendants further agree not to seek the release of any person whose release would constitute an imminent threat to public safety or to the inmate's own health, safety or welfare.

5. If, after twenty-one (21) days from the date on which the maximum allowable population has been exceeded for the period of time specified in Paragraph 3, the population of one or more of the individual facilities still exceeds the maximum allowable population, City Defendants shall admit no additional inmates into such facility or facilities, except persons charged with, or convicted of, murder, forcible rape, or a crime involving the use of a gun or knife in the commission of an aggravated assault or robbery, until the number of inmates housed in the facility or facilities is within the maximum allowable population and new admissions will not cause the maximum allowable population to be exceeded.

6. This Court shall retain jurisdiction of the parties and the cause of action in this matter for five (5) years. At that time, unless the parties reach agreement on the issue of continued jurisdiction, the Court shall discontinue jurisdiction unless Plaintiffs demonstrate, at a hearing, that continued jurisdiction is necessary to maintain the maximum allowable populations prescribed in the parties' Agreement and this Order.

7. Subject to the terms of this Order, all claims asserted in this matter against the City Defendants are dismissed with prejudice. All claims asserted against Defendants Marks and Jeffes are dismissed without prejudice pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

/s/ Norma L. Shapiro
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD FURTICK, CHARLES OAKES, EMANUEL GARDNER	)	CIVIL ACTION
v.	)	
IRENE PERNSLEY, individually and in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, GUETON CURIONE, individually and in his official capacity as Warden of Holmesburg Prison, PHILLIP DUKES, individually and in his official capacity as Warden of the Detention Center, JOHN DAUGHEN, individually and in his official capacity as Warden of the House of	)	

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ORDER

AND NOW, this 19th day of February, upon consideration of the District Attorney's motion to stay implementation of the settlement agreement pending appeal, memoranda filed in support thereof and in opposition thereto, and for the reasons set forth in the foregoing Memorandum, it is ORDERED that said motion is DENIED.

/s/ Norma L. Shapiro
J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD FURTICK, CHARLES OAKES, EMANUEL GARDNER	)	CIVIL ACTION
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Warden of the House of Corrections, RODNEY D. JOHNSON, individually, LEO C. BROOKS, individually, JAMES S. WHITE, individually and in his official capacity as Managing Director of the City of Philadelphia, WILLIAM J. GREEN, individually, HON. WILSON GOODE, individually and in his official capacity as Mayor of the City of Philadelphia, CITY OF PHILADELPHIA, JAY C. WALDMAN, individually and in his official capacity as General Counsel for the Commonwealth of Pennsylvania, RONALD J. MARKS, individually, GLEN JEFFES, individually and in his official capacity as Commissioner of the Pennsylvania Department of Corrections	)	NO. 82-1847

MEMORANDUM and ORDER

NORMA L. SHAPIRO, J. FEBRUARY 19, 1987

On December 31, 1986, this court entered orders denying the motion to intervene of the District Attorney of Philadelphia County, Ronald D. Castille, and approving a settlement between the City defendants[1] and the plaintiff-prisoner class. Presently before the court is the District Attorney's motion to stay implementation of the settlement agreement to which the District Attorney

1. The term City defendants refers to all defendants represented by the City Solicitor. The group includes all defendants except Waldman, Marks and Jeffes.

is not a party, pending appeal of this court's denial of his motion to intervene as a party defendant and oppose entry of the consent order approving plaintiffs' settlement with some but not all the defendants. For the reasons now stated, the motion for a stay delaying the phased implementation of the consent order until the District Attorney's appeal is decided is denied.

This civil rights class action concerning conditions of confinement in City of Philadelphia penal institutions was instituted pursuant to 42 U.S.C.A. § 1983 (West 1981) by ten inmates of Holmesburg Prison in April, 1982.[2] On August 19, 1986, the District Attorney moved to intervene as a party defendant. After written submissions by the District Attorney, the plaintiff-prisoner class and the City defendants, a lengthy evidentiary hearing and oral argument, the court denied the District Attorney's motion to intervene on December 31, 1986. The court subsequently entered a consent order that same date. In that Order, the court approved the settlement between the plaintiff-prisoner class and the City defendants in accordance with Fed.R.Civ.P. 23(e). All claims against the City defendants were dismissed with prejudice. In addition, pursuant to Fed.R.Civ.P.41(a)(1), the court dismissed all claims against defendants Marks and Jeffes without prejudice. The action proceeds against defendant Waldman only because Waldman has refused to agree to his dismissal without prejudice; plaintiff's class counsel is pres-

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2. The procedural history of this action was detailed by this court in its Memorandum and Order denying the motion to intervene of the District Attorney of Philadelphia. *See* Harris v. Pernsley, Civil Action No. 82-1847, Slip Op. at 2-5 (E.D.Pa. December 31, 1986).

ently precluded by a conflict of interest from pursuing this matter. Until plaintiff's class representative obtains new counsel, this matter cannot be closed.

On January 8, 1987, the District Attorney filed a notice of appeal of the order denying his motion to intervene and the consent order approving the settlement agreement. On January 14, 1987, pursuant to Fed.R.Civ. P. 62(c), the District Attorney applied to this court for a stay of the consent order pending appeal. On January 29, 1987, the City defendants and the plaintiff-prisoner class filed responses opposing the motion for stay.

Rule 62(c) provides *inter alia*:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Fed.R.Civ.P. 62(c).

"A request for stay is addressed to the sound discretion of the court." *First Amendment Coalition v. Judicial Inquiry and Review Board*, 584 F. Supp. 635, 637 (E.D.Pa. 1984) (Pollak, J.), *vacated and remanded on other grounds*, 784 F.2d 467 (3d Cir. 1986) (quoting *Evans v. Buchanan*, 424 F. Supp. 875, 879-80 (D. Del.), *aff'd as modified*, 555 F.2d 373 (3d Cir.), *cert. denied*, 434 U.S. 280 (1977) (citing *Coppedge v. Franklin County Board of Education*, 293 F. Supp. 356, 362 (E.D.N.C. 1986); *Hobson v. Hansen*, 44 F.R.D. 18, 21 (D.D.C. 1968), *aff'd in part and rev'd in part*. 408 F.2d 175 (D.C. Cir.

1969)). In exercising its discretion, the court must balance the equities and determine whether the movant has shown that (1) he will likely prevail on the merits of the appeal, (2) he will suffer irreparable injury if the stay is denied, (3) other parties will not be substantially harmed by the stay, and (4) the public interest will be served by granting the stay. *See First Amendment,* 584 F. Supp. at 636 (quoting *Long v. Robinson,* 432 F.2d 977, 979 (4th Cir. 1970); *see also Halderman v. Pennhurst State School & Hospital,* 451 F. Supp. 233, 235 (E.D. Pa. 1978); *Philadelphia Counsel of Neighborhood Organization v. Adams,* 451 F. Supp. 114 (E.D. Pa. 1978); *Resident Advisory Board v. Rizzo,* 429 F. Supp. 222, 224 (E.D. Pa. 1977). The inquiry in determining a motion for stay pending appeal is similar to that in determining a motion for grant of preliminary injunctive relief. *See Pennhurst,* 451 F. Supp. at 235; *Evans,* 424 F. Supp. at 235. Therefore, while these four "factors structure the inquiry . . . no one aspect will determine its outcome. Rather, proper judgment entails a delicate balancing of all elements." *Constructors Assoc. of Western Pa. v. Kreps,* 573 F.2d 811, 835 (3d Cir. 1978) (factors relevant to grant of preliminary injunction). These four factors must be examined to guide the court in the exercise of its discretion in this civil rights class action.

1. *Likelihood of Success*

Because the District Attorney is requesting a stay of the consent order itself until his right to intervene and oppose it is determined, in deciding whether to grant a stay, the court must determine the likelihood of the District Attorney's success not only on his motion to inter-

vene but on his appeal in opposition to the consent order if the motion to intervene is resolved in his favor.

An Order denying a motion to intervene is a final appealable order. *E.g., McKay v. Heyison,* 614 F.2d 899, 903 (3d Cir. 1980); *McClune v. Shamah,* 593 F.2d 482, 485 (3d Cir. 1979); *Commonwealth v. Rizzo,* 530 F.2d 501, 504 (3d Cir. 1976), *cert denied,* 426 U.S. 921 (quoting *Philadelphia Electric Co. v. Westinghouse Electric Corp.,* 308 F.2d 856, 859 (3d Cir. 1962), *cert. denied,* 372 U.S. 936 (1963)). An appeal may be "taken from both aspects of an order denying intervention where it is claimed that the applicant had an absolute right to intervene, and, alternatively, that the district court abused its discretion in denying permissive intervention." *McClune,* 493 F.2d at 485 (citing *Philadelphia Electric,* 308 F.2d at 959)). Therefore, the District Attorney may appeal the Order denying his motion to intervene.

However, the court believes that the District Attorney is unlikely to succeed on the merits even though it is difficult for a district court to consider the likelihood of an appellant's success on appeal. This consideration necessitates a prediction whether the district court was in error. It would be highly unusual for a district court judge to come to this conclusion immediately after a decision on the merits because the decision itself represents the judge's reasoned decision as to what was legally correct. The court believes that the inquiry must be modified in accordance with the view of Judge Pollak expressed in *First Amendment.* In granting a stay pending appeal where the law was unsettled, he stated,

> If the question is whether I think that the balance of probability is that I was wrong and that my order

> will be set aside on appeal, that is not my view. If that were my assessment I would not have decided the merits as I did.
>
> I do not, however, think that whether a stay should be granted must depend on my concluding that I was probably in error. If I am satisfied that there is a reasonable possibility--albeit not a probability--that I was in error, it seems to me that the equities would then shift strongly towards granting a stay.

584 F. Supp. at 638.

Here only whether the standard of review for intervention as of right is plenary may be viewed as unsettled. *See United States v. City of Philadelphia,* 798 F.2d 81 (3d Cir. 1986) (in affirming denial of intervention as of right assumes, without deciding, that review is plenary). In its memorandum of December 31, 1986, this court explained the reasons for denial of the District Attorney's motion to intervene. This court found that the District Attorney had failed to meet the threshold intervention requirement of timeliness. Slip Op. at 6-11. The court also found that the District Attorney did not have a "direct, substantial, legally protectable interest in the proceedings." Slip Op. at 11-14 (quoting *Dodson v. Salvitti,* 77 F.R.D. 674, 676 (E.D. Pa. 1977). Finally, the court determined that any purported interest of the District Attorney was adequately represented by the City defendants. Slip Op. at 14-17. This court's decision was based on well settled law in the Third Circuit.

"Permissive intervention rulings are of course reviewed under an abuse of discretion standard." *United States v. City,* 798 F.2d at 90. In exercising its discretion to deny the application for permissive intervention, the

district court determined that while common questions of law or fact existed between the main action and a proposed cross-claim by the District Attorney against the City defendants, the application for permissive intervention should be denied because granting it would not paint "a fuller picture of the conditions [at issue]," *Christy v. Hammel,* 87 F.R.D. 381, 395 (W.D. Pa. 1985), and would result in delay and prejudice to the existing parties. Slip Op. at 17-20.

In making these determinations, the district court considered the relevant factors in reliance on long standing precedent and articulated its reasons at length. There does not seem to be a reasonable possibility that its decision will be overturned on appeal. However, even if this court were in error on every finding made in denying the District Attorney's motion to intervene, the court would still be compelled to find that the District Attorney is not entitled to a stay pending this appeal because it is highly unlikely that the District Attorney will ultimately succeed on the merits of his appeal of the court's entry of the consent order even if permitted to intervene.

The injunctive provisions of the consent order are subject to appeal as of right pursuant to 28 U.S.C.A. § 1292(a)(1) (West 1966 & Supp. 1986). However, if the district court's denial of the District Attorney's motion to intervene is upheld, the District Attorney would clearly be without standing to appeal the consent order. In *Rizzo,* 530 F.2d 501, the Court of Appeals held that "one properly denied the status of intervenor cannot appeal on the merits of the case." 530 F.2d at 508 (citing *Hoots v. Commonwealth of Pennsylvania,* 495 F.2d 1095 (3d Cir.), *cert. denied,* 419 U.S. 884 (1974). Even if the district court's

Order denying the district Attorney's motion to intervene were reversed and the District Attorney's motion to intervene were granted, the District Attorney would still lack standing to appeal the consent order. The consent order resulted from a settlement between the plaintiff-prisoner class and the City defendants. The Order also provided for dismissal without prejudice of two of the Commonwealth defendants. It did not affect the rights of the remaining Commonwealth defendant, Jay C. Waldman. Similarly, it would not have affected the rights of the District Attorney had he been permitted to intervene as a party defendant.

"The general rule is that in order to have standing to appeal, the appellant must be privy to the record and aggrieved by the order appealed from." *In re Eastern Sugar Antitrust Litigation,* 697 F.2d 524, 527 (3d Cir. 1982). The interests the District Attorney asserts in this action are insufficient under the reasoning of *Cobb v. Aytch,* 539 F.2d 297 (3d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977), and *Graddick v. Newman,* 453 U.S. 928 (1981) (Powell, J. in Chambers), to grant him standing to appeal a consent order by which he is not bound even if as a result of his appeal he became a party defendant.

In *Cobb,* a prisoner civil rights class action alleging that transfers between county and state prison institutions were violative of the plaintiff class's rights under the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the Court of Appeals held that the interests of party defendants, the District Attorney and Commissioner of Police, were insufficient to confer standing to appeal an order approving a settlement

entered into by other defendants. They had no statutory or other authority to determine the circumstances requiring inmate transfer and they were not enjoined from performing any lawful duties. But the defendant Superintendent of the Philadelphia prisons did have standing to appeal because the order removed authority that the Pennsylvania General Assembly had granted to him. 598 F.2d at 299.

Here the consent order at issue did not diminish any right or authority of the District Attorney to administer Philadelphia prisons or enjoin the District Attorney from performing any duty imposed by law. This court found that, as in *Cobb*, any injuries suffered by the District Attorney are indirect and insufficient to grant standing to appeal the entry of this consent decree even if the motion to intervene were granted.

In his in chambers opinion in *Graddick*, a prisoner class action alleging uncontitutional conditions of confinement, Justice Powell discussed the reasons for denial of the Alabama Attorney General's motion for stay of an injunction upon denial of the Attorney General's motion to intervene as a party defendant. The motion for stay was denied for failure to establish either irreparable injury to any cognizable interest or standing to assert that interest. Justice Powell stated:

> Even if [Attorney General] Graddick's allegation of irreparable injury were accepted, he had made no showing that he was the proper official to assert that claim. Graddick's original application presented no state law basis for his attempt to assert the rights of Alabama citizens generally. His standing to represent Alabama's interests in this matter was not self-

> evident in the usual context of his case. Alabama statutes had vested responsibility for the prison system in the Governor, and the Governor, who is also the state's chief executive officer, opposed Graddick's application. The Governor averred that he, not the Attorney General, properly represented the state's interest in this case.

483 U.S. at 934.

Here also the Mayor of the City of Philadelphia opposes the District Attorney's application. The Mayor of the City of Philadelphia and the other defendants named herein, all of whom are very adequately represented by the City Solicitor, are the proper representatives of the public interest because of their legal responsibilities in the matters the subject of this action. The District Attorney's interest in public safety which he shares with other elected officials does not enable him to represent the public interest in holding persons accused of crime or criminals in confinement where that duty has clearly been vested in others by state law. The District Attorney has not shown that he has the right to intervene, that he should have been granted permission to intervene, or that he had standing to appeal from the consent order even if he did intervene. It is settled law that a party cannot appeal from a decision which is not adverse to him. *Cobb,* 539 F.2d at 300.

Finally, if the district court were in error in all these matters, the Court of Appeals would still determine if such error was harmless. *United States v. City,* 798 F.2d at 90; *see also Halderman v. Pennhurst State School and Hospital,* 612 F.2d 131, 134 (3d Cir. 1979) (applying harmless error analysis to denial of motion to intervene for

purpose of appealing). The District Attorney's objections to the proposed settlement were stated on the record for the consideration of the court with the consent of the parties. The district court has already considered all the District Attorney's reasons for disapproval of the consent order in connection with his attack on the inadequacy of the City Solicitor's representation. The district court has nevertheless determined that the consent decree is in the public interest and should be approved for the reasons articulated on the record at the time the consent order was entered and in a memorandum opinion subsequently filed. The opposition to this settlement by the District Attorney has not and would not convince the district court to compel the plaintiff class to pursue litigation against a defendant it does not choose to sue and preclude it from terminating litigation against defendants who seek a settlement that is in the interest of all parties agreeing to it and is also in compliance with the Constitution of the United States.

Because the District Attorney was accorded the right to appear and be heard in opposition to the settlement, denial of his motion to intervene would be at most harmless error unless the Court of Appeals were to conclude that the district court abused its discretion in approving the settlement. Considering the history of this prolonged litigation, the possible termination of the related *Jackson v. Hendrick* litigation (in which denial of intervention by the District Attorney was affirmed by the Pennsylvania Supreme Court) and the settlement agreement, the terms of which the class believes to be in its interest and with which the City defendants are willing to comply, this court does not believe that approving settlement of this litigation will be found abusive of its discretion.

2. *Irreparable Injury to the District Attorney*

The District Attorney asserts that absent a stay pending appeal, he will suffer irreparable injury because "hundreds of prisoners must be released." District Attorney's Memorandum at 6. On the date the consent order was entered, approximately 4,300 prisoners were housed in the Philadelphia prison system, including 250 inmates housed in the partially completed Philadelphia Industrial Correction Center ("PICC"). The consent order requires the City defendants to reduce the population in stages: as of March 9, 1987, the population of the Philadelphia prison system may not exceed 4,100 inmates; as of May 11, 1987, the population may not exceed 3,950 inmates; as of July 13, 1987, the population may not exceed 3,750 inmates. The population must stay at or below 3,750 inmates until the opening of the downtown detention facility. The consent order also specifies population limits for each facility within the system. If the population of one or more of the facilities exceeds the maximum allowable population, the City defendants are required to seek the release of these inmates being held either on the lowest bail or persons sentenced to the Philadelphia prisons with less than sixty (60) days remaining on their sentences. However, the release of inmates charged with, or convicted of, murder or forcible rape will not be sought. Nor will the release be sought of any person who would constitute an imminent threat to public safety or to his own health, safety, or welfare be sought.

The District Attorney has failed to show that a massive release will occur from the phased-in population limits under the consent order. He has failed to show that if the releases provided for in the consent order occur, his legiti-

mate interests will be harmed. The injury asserted is insufficient to convince the court that a stay of the consent order pending the District Attorney's appeal is warranted.

Under the court's consent order, massive releases will not be required. The City defendants in their brief in opposition aver that plans have been developed to reduce the population of the Philadelphia prisons without such releases. The District Attorney has not provided the court with any reason to believe that the City defendants are in error in their belief that they can comply with the prison population limits provided for in the consent decree or that, with reasonable cooperation of the courts and other public officials, they will fail in their efforts. The Chief Justice of Pennsylvania, Robert N.C. Nix, Jr., announced on January 14, 1987, that persons in pretrial detention shall have priority in state court criminal trial listings. The court is unwilling to assume that the systemic reforms that will be instituted must be unsuccessful.

Even if releases were required to comply with the population limits, the District Attorney has failed to meet his burden of showing an irreparable injury to him. The District Attorney states, "[a]s court statistics establish, many of these released defendants will commit new crimes or fail to appear for trial. These harms, once they occur, cannot subsequently be remedied. Thus, unless a stay is granted, the District Attorney's right to appeal will be rendered substantially meaningless." District Attorney's Memorandum at 7.

The District Attorney provides no support for this statement. If relying on statistics presented at the evidentiary hearing on his motion to intervene by the testimony

of witness Maria Terpollili, Senior Supervisor, Pretrial Services Unit, Court of Common Pleas of Philadelphia County, the data presented by Ms. Terpollili was unworthy of consideration and was in part ruled inadmissible. The District Attorney attempted to show through her testimony that a high percentage of criminal defendants released under the *Jackson v. Hendrick*[3] program were rearrested or failed to appear for trial. The methodology used in preparing the ratios presented to the court was so flawed that the ratios were meaningless if not misleading. The calculated "failure to appear" rates also did not differentiate between a person whose failure to appear was caused by a lack of notice and one who simply chose not to appear. The District Attorney was unable to present comparable statistics for other pretrial detainees released on O.R. or cash bail. The District Attorney argued that if additional pretrial detainees were released, the failure to appear and rearrest rates would be even higher. Release of pretrial detainees may have the indirect effect of making the District Attorneys' prosecutorial tasks somewhat more difficult but the evidence presented is insufficient to find that the District Attorney would suffer significant irreparable injury by release of pretrial detainees required to bring the prison population into compliance with the consent order. If pretrial detainees present the threat the District Attorney asserts, the solution is to hold prompt trials so that those

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3. Jackson v. Hendrick is a class action in equity alleging unconstitutional conditions of confinement in Holmesburg Prison filed in the Court of Common Pleas of Philadelphia County in February, 1971. The interrelationship of this action and the *Jackson* litigation is discussed in this court's prior Memorandum and Order. *See* Harris v. Pernsley, Civil Action No. 82-1847, Slip Op. at 3-4 (E.D. Pa. December 31, 1986).

accused of serious crimes are convicted, sentenced and committed to state custody, rather than continued indefinitely in pretrial status because trial priority is given to those released on bail.

The court does not believe that the injury the District Attorney alleges is sufficient to warrant a stay pending appeal even if the District Attorney had met his burden of showing that the injury would occur. Because this court on its own initiative or under the direction of the Court of Appeals can alter the population limits during the period it retains jurisdiction, denial of a stay pending appeal will not render whatever right the District Attorney has to appeal "substantially meaningless." District Attorney's Memorandum at 7. Preferential trial listings where the accused is in detention awaiting trial will alleviate whatever substance there is to the District Attorney's concern about release of most pretrial detainees. At worst, the failure to grant a stay pending appeal will make it more difficult for the District Attorney to prosecute some pretrial detainees released during the pendency of the appeal. In view of the unlikelihood of success on the merits, the minimal injury to the putative intervenor (some of which is within his power to ameliorate), the substantial prejudice to all parties to the settlement agreement if its implementation is delayed, and the public interest in this settlement, that injury is clearly insufficient to warrant a stay.

3. *Substantial Harm to the Parties*

The grant of a stay pending appeal would cause irreparable harm to the plaintiff-prisoner class. The District Attorney argues that no harm would be caused to existing parties by a stay pending appeal because the

plaintiff-prisoner class has no legitimate expectation of release. *See* District Attorney's Memorandum at 7. The District Attorney is correct that the plaintiff-prisoner class has no legitimate expectation of release from prison. But the District Attorney incorrectly assumes that the plaintiff-prisoner class primarily seeks approval of the settlement to obtain release of its members. The class seeks approval of the settlement primarily to achieve a portion of the relief demanded in the amended complaint for allegedly unconstitutional conditions of confinement. Plaintiffs have not only a legitimate expectation but a right to constitutional conditions of confinement. There has been no adjudication of the constitutionality of the conditions of confinement in the City penal institutions, but the City defendants, without any admission of fault or liability, have offered substantial relief to the plaintiff-prisoner class by this settlement. It is against public policy favoring settlement of civil rights class actions to grant a stay pending appeal that because there has been no judicial finding of unconstitutionality in this court. Irreparable injury will be caused to the plaintiff class by granting a stay pending appeal because class members would be forced to continue in confinement under conditions less humane than those obtained if settlement is implemented in accordance with the agreement with the City defendants.

The District Attorney is apparently opposed only to the prison population limits. However, granting his motion would stay all the provisions of the consent decree, even those provisions beneficial to the class to which the District Attorney has stated no objection, such as time to post bail at the Police Administration Building, hous-

ing assignment within 72 hours, sleeping quarters, mattresses, bedding and perhaps most important, construction of a downtown 440 bed detention facility by December 31, 1990. The District Attorney offers no reason to delay these substantial benefits and there is none.

4. *The Public Interest*

Granting a stay pending appeal would not be in the public interest. In its opinion approving the settlement agreement, the court articulated the reasons the settlement agreement was in the public interest. *See Harris v. Pernsley, Civil Action* No. 82-1847, Slip Op. at 30-31 (E.D. Pa. February 19, 1987). Staying its implementation is not.

The District Attorney argues that the consent order should be stayed in the public interest because, "[a]bsent a stay, hundreds of prisoners, most of whom are accused felons with criminal records, will be released." The court finds compliance with the court's consent order less disturbing than the District Attorney. The record established that 70% of the persons in Philadelphia prisons are pretrial detainees who are presumed innocent. While some pretrial detainees are held on high bail for serious charges, a large number are held on minimal bail and would not be in custody if they had sufficient funds. Low bail suggests that the judicial officer setting it did not consider such defendants a serious threat to the public safety. The District Attorney refuses to recognize in his arguments for a stay of the consent order that there will be no release of prisoners accused or convicted of murder or forcible rape or of prisoners who present an imminent

threat to their own or the public safety. Releases might not ever be required if the District Attorney brings cases to trial promptly as required by law and gives priority to cases where the defendant is being held in detention as required by the Chief Justice of Pennsylvania, Robert N.C. Nix, Jr. Statement reported in *The Retainer,* January 28, 1987.[4] Therefore, the public interest does not mandate grant of a stay pending appeal.

Instead, delay in the implementation of this court's order is against the public interest. It would infringe upon the public safety interest in orderly and safe operation of the City prisons. The City defendants argue that the current prison populations strain the resources of the prisons. *See* City defendants' Brief in Opposition at 11. While the City defendants could certainly institute systemic reforms to lower the population in the penal institutions voluntarily, the court recognizes that the City defendants are less likely to do so in the absence of a

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4. The consent order expressly provides if the maximum allowable population in one or more of the prisons is exceeded:

> the City defendants shall seek the release, through the mechanism of the Bail Master appointed by the *Jackson* court or otherwise, or persons being held either on the lowest bail or persons sentenced to the Philadelphia prisons with less than sixty (60) days remaining to serve on their sentences. Such releases shall continue until the maximum allowable population is achieved or restored. City defendants agree not to seek the release of any person charged with, or convicted of, murder or forcible rape; City defendants further agree not to seek the release of any person whose release would constitute an imminent threat to public safety or to the inmate's own health, safety or welfare.

Consent Order, ¶ 4.

court order. The interest in protecting public safety by maintaining safe prisons is more pressing than the District Attorney's interest in confining persons accused of non-violent crimes prior to trial where that interest may be met by complying with the Sixth Amendment right to speedy trial.

The strongest public interest is in protection of civil rights guaranteed to all by the Constitution of the United States. Society in general as well as those in custody are severely harmed when persons are held under conditions of confinement that are arguably in violation of the Eighth Amendment. While it may not be as easy to perceive the harm caused, the court believes that it is more serious than that which the District Attorney alleges will occur if the motion for stay is denied. Granting the District Attorney's motion to stay is not in the public interest.

Implicit in the District Attorney's motion to stay is an unarticulated concern that this settlement agreement will impede the administration of his office by requiring compliance with state deadlines for preliminary hearings (10 days) and speedy trials (180 days). No such requirements enter into the population limitations imposed or the release procedures provided. However, the effect of the settlement agreement's implementation may be to require priority in the disposition of the criminal list be given to cases where the untried are being held in detention awaiting trial. There was testimony at the evidentiary hearing that this was not the District Attorney's preference, but this court assumes that the District Attorney as well as the state court administrators will com-

ply with the recent mandate of the Chief Justice of Pennsylvania that this be done in part to meet the crisis created by 10 judicial vacancies and 15 judicial suspensions. No doubt other solutions to this serious problem in court administration will be sought and implemented. But no concern of the District Attorney can justify impeding the momentum for improvement in prison overcrowding accomplished by the entry of the consent order. The Commissioner of the Department of Human Services of the City of Philadelphia, the members of the Board of Trustees of the Philadelphia prison system, the Superintendent of the Philadelphia prison system, the Warden of Holmesburg Prison, the Warden of the Detention Center, the Warden of the House of Corrections, the Managing Director of the City of Philadelphia, the Mayor of the City of Philadelphia, and the City of Philadelphia are all parties to the settlement and agree its terms can be met without undue risk to the community. They and court administrators are ready, willing and able to implement the consent order. This court will not stay the cooperative effort to ensure that conditions of confinement are consistent with the Constitution.

Because the District Attorney has failed to meet his burden of proof on any of the four factors relevant to the grant of a stay pending appeal, the motion for stay pending appeal is denied. An appropriate Order follows.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1025

MARTIN HARRIS, et al.

vs.

IRENE PERNSLEY, etc., et al.

RONALD D. CASTILLE, District Attorney of Philadelphia County, proposed intervenor, Appellant

(E.D.Pa. Civil 82-1847)

Present: GIBBONS, *Chief Judge,* SEITZ and GARTH, *Circuit Judges.*

ORDER

Ordered that the motion for a stay pending appeal by Ronald D. Castille is granted until the further order of this court solely as to its provision of the consent decree placing caps on the population of the Philadelphia Prison System.

Judge Gibbons would deny the stay.

By the Court,
/s/ Seitz
Circuit Judge

Dated: March 6, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1025

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD RUTICK, CHARLES OAKES, EMANUEL GARDNER

v.

IRENE PERNSLEY, individually and in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, GUETON CURIONE, individually and in his official capacity as Warden of Holmesburg Prison, PHILLIP DUKES individually and in his official capacity as Warden of the Detention Center. JOHN DAUGHEN, individually and in his official capacity as Warden of the House of Corrections, RODNEY D. JOHNSON, individually, LEO C. BROOKS, individually, JAMES S. WHITE, individually and in his official capacity as Managing Director of the City of Philadelphia, WILLIAM J. GREEN, individually, HON. WILSON GOODE, individually and in his official capacity as Mayor of Philadelphia, CITY OF PHILADELPHIA, JAY C. WALDMAN, individually and in his official capacity as General Counsel for the Commonwealth of

Pennsylvania, RONALD J. MARKS, individually, GLEN JEFFES, individually and in his official capacity as Commissioner of the Pennylvania Department of Corrections RONALD D. CASTILLE, District Attorney of Philadelphia County, Proposed Intervenor,

Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania - Philadelphia

(D.C. Civ. No. 82-1847)

Argued: March 3, 1987

Before: GIBBONS, *Chief Judge*, SEITZ, and GARTH, *Circuit Judges*.

Filed: May 15, 1987

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

Ronald Castille, the District Attorney of Philadelphia County, appeals the orders of the district court denying his motion to intervene as of right and approving the settlement agreement reached by the parties in this prison conditions litigation. This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

I.

In 1982 ten inmates at the Holmesburg Prison in Philadelphia filed a *pro se* complaint in federal district court seeking damages and injunctive relief for themselves and for a class consisting of all inmates of the Holmesburg prison since that date and all future Holmesburg inmates. Counsel appointed for the plaintiffs filed an amended complaint, pursuant to 42 U.S.C. § 1983 (1982), alleging that the conditions of the prison violated the eighth and fourteenth amendments. The amended complaint named as defendants the City of Philadelphia, the Philadelphia officials responsible for supervising the prisons, the Board of Trustees of the Philadelphia Prison System, the Warden of the Holmesburg Prison (collectively, the City Defendants or the City), and several state officials.

The district court dismissed the action on *res judicata* and abstention grounds in light of state court litigation, *Jackson v. Hendrick,* challenging the constitutionality of the Philadelphia prisons. This court reversed the district court's conclusion that the *Jackson v. Hendrick* litigation precluded hearing this action. *Harris v. Pernsley,* 755 F.2d 338 (3d Cir. 1985). We denied the City's petition for rehearing on March 21, 1985. 758 F.2d 83 (3d Cir. 1985). On November 4, 1985, the Supreme Court denied the defendants' petition for certiorari. — U.S. —, 106 S.Ct. 331, 88 L.Ed.2d 314 (1985).

After remand to the district court, the plaintiffs filed a second amended complaint expanding the plaintiff class to include the inmates of all the Philadelphia prisons and adding the wardens of the Detention Center and the House of Corrections as party defendants. The plaintiffs and

City defendants then entered into settlement negotiations. On August 8, 1986, they informed the court that they had reached agreement. On this same date, the Mayor wrote the District Attorney a letter informing him that the parties had reached an agreement in this litigation and in the pending state court action.[1] A copy of a proposed consent decree was submitted to the district court on August 15.

On August 19 the District Attorney filed a motion to intervene as of right, pursuant to Fed. R. Civ. P. 24(a), as a full party defendant, or in the alternative, to intervene permissibly under Fed. R. Civ. P. 24(b). Both the City Defendants and the plaintiffs opposed this motion.

The parties then withdrew the proposed consent decree. After consulting with representatives of the District Attorney and the state courts, the City defendants renegotiated a settlement agreement with the plaintiffs. On October 3, the parties, except the state court defendants, submitted a second proposed consent decree to the court. It contained, among other things, a limit on the prison population.

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1. *Jackson v. Hendrick* has been pending in the state courts since 1971. A three-judge state court panel held in 1972 that the prisoners' conditions of confinement amounted to cruel and unusual punishment, and ordered the appointment of a special master to assist the court in fashioning appropriate relief. The Pennsylvania Supreme Court affirmed this ruling. *Jackson v. Hendrick*, 457 Pa. 405, 321 A.2d 603 (1974). Between 1977 and 1983, the parties agreed to a series of consent decrees designed to alleviate overcrowding and other conditions in the prisons. In 1986, the supreme court remanded the case to the Philadelphia Common Pleas Court for consideration of whether the conditions in the Philadelphia prisons continued to violate the federal constitution. 509 Pa. 356, 503 A.2d 400 (1986).

After the second proposed consent decree was delivered to the district court, the District Attorney filed a proposed answer to the plaintiffs' complaint denying that the conditions in the Philadelphia prisons were unconstitutional. In addition, he submitted a proposed cross-claim against the City defendants, alleging that the proposed consent decree unlawfully interfered with his functions. The cross-claim sought a declaratory judgment that the City had no power to interfere with the District Attorney's duties, including entering an agreement that would result in the release of inmates who are serving sentences or who present either a threat to the community or a risk that they will fail to appear for trial. The District Attorney also sought a permanent injunction against the City to prevent it from entering any settlement that interfered with his duties.

The district court held two evidentiary hearings and heard oral argument on the District Attorney's motion to intervene. The District Attorney presented witnesses and introduced stipulated statements of a number of persons. Appellees did not present any evidence, but did cross-examine the District Attorney's witnesses.

Edward Rendell, the District Attorney from January 1978 to January 1986, testified that he had no knowledge of this litigation while he served as the District Attorney. He further testified that he believed that a cap on prison populations would affect the District Attorney's interest in prosecutions because those released without posting bail would not appear for their trials.

The present District Attorney testified that he did not learn of this litigation until August 1986. Deputy District

Attorney Eric Henson testified that he became aware of this litigation in March 1985, when he read this court's opinion, and that he did not bring the case to the attention of the then District Attorney. He further stated that at that time he believed the City defendants were adequately representing the District Attorney's interest and that should the City decide not to litigate the case, it would inform the District Attorney before taking any action.

The District Attorney presented the testimony of Maria Terpolilli, the Senior Supervisor of the Bail Hearings Unit of the Pretrial Services Division of the Philadelphia Court of Common Pleas, to provide evidence of the failure to appear rates for persons under various release programs, including the one instituted by the *Jackson v. Hendrick* litigation, and of the rearrest rates for persons released under the *Jackson v. Hendrick* program.[2] The District Attorney attempted to show that the failure to appear and rearrest rates under the *Jackson v. Hendrick* program were extremely high. After cross-examination of Terpolilli, however, the district court refused to admit the ratios that Terpolilli derived from her statistics, finding the ratios "meaningless."

In addition, the District Attorney proffered statements from a number of state court officials as to their discussions with City officials about the proposed agreements. Finally, the parties stipulated to statements from prison

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2. Under the *Jackson v. Hendrick* release mechanism, weekly lists of pretrial detainees are sent to a bail master who in turn holds hearings to determine who should be released. The District Attorney has the right to appear at these hearings, and may appeal the decisions of the bail master.

officials concerning the improvements in prison conditions since the *Jackson v. Hendrick* litigation was instituted. After hearing oral argument, the district court took the District Attorney's motion to intervene under advisement.

At the beginning of the hearing on the proposed consent decree, the district court informed the District Attorney that it was going to deny his motion to intervene. With the consent of the parties, however, the court permitted the District Attorney to present his objections to the proposed consent decree, both at the hearing and in written submissions. At the hearing, the District Attorney argued that the proposed settlement would endanger public safety, that there was no reason to enter such an agreement absent a finding that conditions in the Philadelphia prisons were unconstitutional, that the consent decree went beyond what is required by the Constitution, and that the settlement would, in effect, undo the bail determinations and sentences of state court judges. The City and the plaintiffs reiterated their contention that the proposed settlement was fair and reasonable.

On December 31, the district court filed its opinion and order formally denying the District Attorney's motion to intervene, finding that he failed to meet any of the requirements of the rule for intervention of right. In addition, she denied his motion for permissive intervention. Because of these rulings it was not necessary for the district court to address the District Attorney's proposed answer to the complaint and proposed cross claim. On this same date, the district court entered its order approving the settlement agreement proposed by the plaintiffs and City

defendants.[3] These appeals by the District Attorney followed.[4]

II.

The District Attorney asserts that, contrary to the district court's ruling, he has an absolute right to intervene in this action as a full-party defendant to litigate the constitutionality of the conditions of the Philadelphia prison system and the relief, if any, to which the plaintiffs may be entitled. Under Rule 24(a)(2),[5] a person is entitled to intervene if (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation. *See Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 504 (3d Cir.), *cert. denied sub nom. Fire Fighters Union v. Pennsylvania*, 426 U.S. 921,

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3. The state defendants are not a part of the consent decree, and none of the terms affect them. Two of the state defendants, Marks and Jeffes, were dismissed without prejudice at the same time as the district court entered its order approving the consent decree. The action is still pending against the other state defendant, Waldman.

4. On the motion of the District Attorney, we stayed the implementation of the consent decree's ceiling on the population pending the outcome of this appeal.

5. Rule 24(a) provides, in relevant part:

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject matter of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

96 S. Ct. 2628, 49 L.Ed.2d 375 (1976). Although these requirements are intertwined, each must be met to intervene as of right. *See e.g., New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 463 (5th Cir.) (in banc), *cert. denied sub nom. Morial v. United Gas Pipe Line Co.*, 469 U.S. 1019, 105 S. Ct. 434, 83 L.Ed.2d 360 (1984); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.071[1] at 24-50 (2d ed. 1982); 7C C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil 2d* § 1908 at 262 (1986).[6]

A.

Because of its pervasive importance in the setting of the case, we at once focus on the second requirement: whether the District Attorney has shown a sufficient interest in this litigation. This circuit has not addressed what type of interests are necessary to entitle an applicant to intervene as of right. And as one court has noted, given the multitude of situations in which intervention controveries can arise, what constitutes such an interest "defies a simple definition." *Restor-A-Dent Dental Laboratories, Inc. v. Certified Alloy Products, Inc.*, 725 F.2d 871, 874 (2d Cir. 1984).

The Supreme Court has stated that under Rule 24(a)(2), an applicant's interest must be one that is "significantly protectable." *Donaldson v. United States*, 400 U.S. 517, 531 (1970). Several circuits have concluded that an

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6. As the Second Circuit has noted, however, a very strong showing that one of the requirements is met may result in requiring a lesser showing of another requirement. *See United States v. Hooker Chemical & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984).

applicant must demonstrate a legal interest in the action to intervene as of right. *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (the interest must be "legally protectable"); *New Orleans Public Service, Inc., supra*, 732 F.2d at 463 (intervention as of right requires a "direct, substantial, legally protectable interest in the proceedings"); *Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982) (same). *But see Smith v. Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1980) (an applicant "need not show that he has a legal or equitable interest in jeopardy . . . [but] must show that he has a 'protectable interest' in the outcome of the litigation of sufficient magnitude to warrant inclusion in the action.") (citations omitted). In addition, a number of courts have concluded that this interest must be "direct," as opposed to contingent or remote. *See Restor-A-Dent Dental Laboratories, supra*, 725 F.2d at 874; *Air Lines Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 105 (7th Cir. 1972); 3B *Moore's Federal Practice, supra*, ¶ 24.07[2] at 24-59.

Courts have not been able to develop more than these general guidelines to answer what type of interest is necessary for intervention. *See generally*, 3B *Moore's Federal Practice, supra*, ¶ 24.07[2] at 24-57 ("The exact nature of the interest required . . . has eluded a precise and authoritative judicial definition . . . ."). Because Rule 24(a)(2) was designed to permit courts to solve intervention disputes in a pragmatic manner, it "requires consideration of all the competing and relevant interests raised by an application for intervention." *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984); *see Neusse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967).

B.

With these rather conclusory guidelines in mind, we turn now to the District Attorney's argument that the district court erred in concluding that this litigation did not sufficiently implicate his interests to require intervention under Rule 24(a)(2). We must first determine the scope of review of the district court's determination denying the District Attorney's motion for intervention of right.

As we noted above, intervention controversies arise in many different contexts, and require the court to consider the pragmatic consequences of a decision to permit or deny intervention. The variety of situations in which an application may arise counsels against setting strict legal standards by which courts may measure applications under Rule 24(a)(2). *See* Shreve, *Questioning Intervention of Right--Toward A New Methodology Of Decisionmaking*, 74 Nw. U.L. Rev. 894, 916-24 (1980). This same reasoning supports an abuse of discretion standard of review, which we now adopt. *See United States v. Hooker Chemicals & Plastics Corp., supra*, 749 F.2d at 991. *But see People of State of California v. Tahoe Regional Planning Agency*, 792 F.2d 779, 781 (9th Cir. 1986) (district court's denial of intervention as of right reviewed *de novo*).

We note, however, that our review of district court's decisions denying intervention of right is more stringent than the abuse of discretion review accorded to denials of motions for permissive intervention. Rule 24(a)(2) restricts the district court's discretion by providing that an applicant "shall be permitted to intervene" if he or

she satisfies the requirements of the Rule. *See Stringfellow v. Concerned Neighbors in Action*, — U.S. —, 107 S. Ct. 1177, 1185 n.1, 94 L.Ed.2d 389 (1987) (Brennan, J., concurring). We, therefore, will reverse a district court's determination on a motion to intervene of right if the court "has applied an improper legal standard or reached a decision that we are confident is incorrect." *United States v. Hooker Chemicals & Plastics Corp., supra*, 749 F.2d at 992; *see generally, United States v. Criden*, 648 F.2d 814, 817-19 (3d Cir. 1981) (discussing the meaning of the "abuse of discretion" standard of review).

In this case, the District Attorney asserts a legal interest in support of his motion to intervene: his duties as a public official. The scope of his interest is defined by the scope of his legal duties under Pennsylvania law.[7] *See Olden v. Hagerstown Cash Register, Inc.*, 609 F.2d 271, 273 (3d Cir. 1980). If his rights and duties, as defined by Pennsylvania law, may be affected directly by the disposition of this litigation, the District Attorney has a sufficient interest to intervene as of right in this action. *See Blake v. Pallan*, 554 F.2d 947, 953 (9th Cir. 1977); *Hines v. D'Artois*, 531 F.2d 726, 738 (5th Cir. 1976); *see also Neusse v. Camp, supra*, 385 F.2d at 700 (state banking commissioner has right to intervene in action brought by a state bank against the Comptroller where federal law incorporates the state's banking laws because he has an interest in the enforcement of the state laws' policies). We turn then to a recitation of the basic

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7. Whether the legal duties as defined by Pennsylvania law are sufficient to give the District Attorney the right to intervene is, however, a question of federal law. *See New Orleans Public Service, supra*, 732 F.2d at 466 n.29.

terms of the consent decree so that they may be juxtaposed with the authority accorded the District Attorney under Pennsylvania law.

At the time the consent decree was approved, there were 4300 inmates in the Philadelphia prison system; approximately two-thirds of the inmates were awaiting hearing or trial. The decree requires the inmate population in the present facilities to be reduced, in stages, to 3750 persons within six months. The ceiling on the prison population agreed to by the parties is higher than the ones that have been ordered by the Pennsylvania courts in the *Jackson v. Hendrick* liitgation. *See, e.g., Jackson v. Hendrick, supra,* 503 A.2d at 403; *Jackson v. Hendrick, supra,* 446 A.2d at 231.

If the inmate population of the prisons exceeds the maximum permissible under the consent decree, the agreement provides that the City "shall seek the release, through the mechanism of the Bail Master appointed by the *Jackson* court or otherwise, of persons being held either on the lowest bail or persons sentenced to the Philadelphia prisons with less than sixty days remaining to serve on their sentences."[8] The City will not to [sic] seek the release of inmates charged with murder or forcible rape, or persons who, if released, posed an imminent threat to the public or themselves.

The settlement recognizes that the prison population fluctuates daily, and thus provides that the population may exceed the maximum temporarily, but not for more

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8. For a description of the release mechanism used by the *Jackson* court, see, *supra,* n.2.

than seven days consecutively or twenty days out of any forty. If the population of a facility exceeds the limit for more than the allowable flux time, the decree provides that the City defendants cannot admit additional inmates to the facility. This provision does not apply to "persons charged with, or convicted of, murder, forcible rape, or a crime involving the use of a gun or knife in the commission of an aggravated assault or robbery."[9]

The statute establishing the office of district attorney provides, in relevant part: "The district attorney shall sign all bills of indictment and conduct in court all criminal and other prosecutions . . . ." 16 Pa. Cons. Stat. Ann. § 1402(a) (Purdon Supp. 1986). The Pennsylvania Supreme Court has interpreted this statute as giving the District Attorney the power, and the duty, "to represent the Commonwealth's interests in the enforcement of its criminal laws." *Commonwealth ex rel. Specter v. Bauer*, 437 Pa. 37, 41, 261 A.2d 573, 575 (1970). The District Attorney is the "sole public official charged with the legal responsibility of conducting 'in court all criminal and other prosecutions.'" *Id.* at 43, 261 A.2d at 576 (citation omitted).

In particular, the District Attorney advocates specific bail levels and may appeal bail determinations with which he disagrees. *See, e.g., Commonwealth of Pennsylvania v. Truesdale*, 449 Pa. 325, 291 A.2d 892 (1972) (District Attorney appealing bail decision). The District Attorney

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9. The consent decree also contains provisions regulating certain living conditions for the inmates. The focus of the District Attorney's motion to intervene, however, is the fact the decree contains a cap on the prison conditions.

also has the power to advocate sentences, to defend convictions in both state court actions and habeas actions in federal court, and to represent the Commonwealth in challenges tithe [sic] constitutionality of the state's penal statutes. *See Specter v. Bauer, supra,* 437 Pa. at 42-43, 261 A.2d at 575-76. In short, the District Attorney is charged with the responsibility of enforcing the Commonwealth's criminal statutes.

The Philadelphia Home Rule Charter vests the Philadelphia Department of Public Welfare with the responsibility of supervising the Philadelphia prison, including the power to set the capacity of the institutions. 351 Pa. Admin. Code § 5.5-700(c) (1986).[10] The Charter futher provides that the Board of Trustees of the Philadelphia Prison System has the responsibility of managing the prisons. 351 Pa. Admin. Code § 5.5-701 (1986).

The Home Rule Charter, however, cannot provide the City with powers contrary to those granted by state statutes. 53 Pa. Cons. Stat. Ann. § 13133(b) (Purdon 1957). The Charter, thus, cannot provide support for the City to encroach on any duties vested in the District Attorney by state statute. *Specter v. Bauer, supra,* 437 Pa. at 43, 261 A.2d at 576.

Given the pertinent terms of the consent decree and the legal duties of the District Attorney, we must decide whether the duties enumerated above are implicated sufficiently in this prison overcrowding litigation that the District Attorney has the right to intervene. As we un-

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10. Under Pennsylvania law, cities such as Philadelphia have the authority to establish charters for their governments. 53 Pa.C.S.A. § 13101 (Purdon 1957).

derstand the District Attorney's position, he seeks to intervene in this action to litigate the prisoners' claims of unconstitutional conditions and to prevent a settlement to which he objects. According to the District Attorney, he has a right to intervene as a full-party defendant because limits on prison populations are a traditional response to a finding of unconstitutional conditions in prisons and this remedy would adversely affect his functions.

The District Attorney asserts that a limitation on the prison population will interfere with his prosecutorial powers in two ways. First, he argues that a prison cap will result in the release of inmates who have not posted the bond set by state court judges or inmates who have not served their full sentences. This, in turn, will result in his work going for naught and will hamper his ability to prosecute cases because those released without posting bond will not appear for their trials.

Second, he directs the court's attention to the fact the prison cap may make it impossible for the City prisons to admit additional persons. He contends that if the City refused to operate any jails, the refusal would interfere with his duties because his function as a prosecutor would be rendered meaningless. According to the District Attorney, it therefore follows that if some individuals are not admitted to prison because of the ceiling placed on the prison population, his role is rendered meaningless for those individuals.

In considering whether the District Attorney has a sufficient interest in this case, for intervention purposes, we will analyze the District Attorney's position in two stages: first, whether he has a right to intervene to op-

pose the plaintiff's claims of unconstitutional conditions on the merits and second, whether he has a right to participate in the formation of the remedy.

Given the nature of an applicant's interest, he or she may have a sufficient interest to intervene as to certain issues in an action without having an interest in the litigation as a whole.[11] *See Howard v. McLucas*, 782 F.2d 956, 962 (11th Cir. 1986) (nonminority employees have the right to intervene to challenge the promotional remedy, but not to contest the existence of past discrimination); *Bradley v. Milliken*, 620 F.2d 1141, 1142 (6th Cir. 1980) (representative of Hispanic community has right to intervene for the limited purpose of presenting evidence on question of *de jure* segregation of Hispanics); *see generally* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L.Rev. 721, 752-56 (1968) (discussing limited intervention as of right). Examining an applicant's asserted interest in terms of discrete phases of an action seems particularly appropriate in institutional litigation. In institutional reform litigation, while only some individuals may be held liable for the unlawful conduct, and thus have an interest in the determination of liability, a larger number of persons' interests may be infringed on at the remedial stage of the litigation. *See, e.g., Equal Employment Op-*

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11. The Advisory Committee's Note to the 1966 Amendments acknowledge that intervention as of right "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." Although one authority has objected to placing limitations on those who intervene as of right, *see Wright, Miller & Kane, supra*, § 1922, we believe that, given the complexity of much public law litigation, permitting courts to limit intervention as of right to discrete phases of the litigation may be necessary in some cases.

portunity Commission v. American Telephone and Telegraph Co., 506 F.2d 735 (3d Cir. 1974).

C.

We thus turn to the District Attorney's contention that he has a right to intervene to litigate whether the conditions in the prison are unconstitutional. Under Pennsylvania law, the City defendants are vested with the responsibility of managing the prison system. It is the City, therefore, that would incur any liability, including attorney's fees under 42 U.S.C. § 1988 (1982), if the prison conditions were found to violate the Constitution.

The District Attorney, on the other hand, has no legal duties or powers with regard to the conditions in the Philadelphia prison system. He has no function in the administration of the prisons. His participation in the liability stage could not contribute to a greater understanding of the issues involved in this phase of the litigation.

Moreover, after five years in the federal courts, and fifteen years in the state courts, the City officials charged both with the duty of managing the prisons and presumably an awareness of the situation, have concluded that they should not litigate the issue of the constitutionality of the conditions in the prisons. This combination of circumstances lead us to conclude that the District Attorney, who has no role in the prison management and cannot be held liable for any unlawful conditions, does not have the right to prevent the City from effectuating its reasoned judgment that it is best not to litigate the action. Otherwise stated, the District Attorney has no interest

entitling him to litigate the plaintiffs' contention that the conditions in the Philadelphia prison system are unconstitutional.

D.

We now address the more difficult question presented on appeal: whether the District Attorney has the right to intervene as a party in the formation of the terms of the settlement agreement in this case. The district court denied the District Attorney's motion because it found that the enforcement of the Commonwealth's penal statutes was not an issue in this case. It further stated that "[w]hile the final disposition of this action--either by settlement or by injunctive relief granted after a finding of unconstitutional conditions--could have some effect on the District Attorney's enforcement function, it is not the kind of direct, substantial interest that permits intervention as of right." The District Attorney asserts that the court committed a legal error, in so concluding.

As discussed above, the District Attorney has the power and duty to advocate bail levels, to prosecute defendants, to recommend sentences once defendants are convicted, to defend convictions on appeal, and to defend challenges to the Commonwealth's penal statutes. He is the official who represents the Commonwealth's interests in criminal law enforcement.

The consent decree presented to, and approved by, the district court does not alter any of the duties enumerated above. The District Attorney is not prevented from performing his statutory duties. He is not obligated to take any action, or refrain from any action, by the decree; moreover, he could not be held in contempt under

this decree. In short, none of his enumerated legal duties are taken away by the settlement approved in this case.

Because the consent decree does not alter the District Attorney's legal duties, *Cobb v. Aytch*, 539 F.2d 297 (3d Cir. 1976), *cert. denied sub nom. Engelfried v. Aytch*, 429 U.S. 1103, 97 S. Ct. 1130, 51 L.Ed.2d 554 (1977), does not control this case. In *Cobb*, inmates of the Philadelphia prisons challenged the transfer of prisoners between the county and state prisons and named as defendants two state officials--the Attorney General and the Commissioner of Corrections--and three city officials--the District Attorney, the Commissioner of Police, and the Superintendent of the Philadelphia Prisons. The district court approved an agreement reached between the state officials and the plaintiffs, and the city officials appealed. We held that the court erred in approving the settlement over the objections of the Superintendent because, although the decree did not mention him, it took away his right, granted by state statute, to petition the state authorities to accept inmate tranferees from the Philadelphia prisons. *Id.* at 300-01. In this case, by contrast, the decree does not limit the District Attorney's exercise of his statutory duties.

The District Attorney argues, however, that although the decree does not impinge expressly on his functions, his powers will be affected as a practical matter by the operation of the decree. In particular, he argues that the prison cap will hinder his ability to prosecute cases because some of the pre-trial detainees released will not appear for trial. He also asserts that if the City is forced to refuse admissions to the prisons, his role as a prosecutor will be rendered meaningless as to those not ad-

mitted. Finally, he asserts that his participation as a party is necessary to protect the public interest.

We agree with the District Attorney that Rule 24(a)(2) directs the courts to consider the practical consequences of the litigation in passing on an application to intervene as of right. As one court has noted, "the court is not limited to consequences of a strictly legal nature . . . [but] may consider any significant legal effect on the applicant's interest . . . ." *National Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 578 F.2d 1341, 1345 (10th Cir. 1978). Courts thus have found that an applicant has a sufficient interest to intervene when the action will have a significant *stare decisis* effect on the applicant's rights, *e.g., Smith v. Pangilinan, supra*, 651 F.2d at 1325, or where the contractual rights of the applicant may be affected by a proposed remedy, *e.g., Little Rock School District v. Pulaski County Special School District, No. 1*, 738 F.2d 82, 84 (8th Cir. 1984); *Equal Employment Opportunity Commission v. American Telephone and Telegraph Co., supra*, 506 F.2d at 741-42.

At the same time, however, to have an interest sufficient to intervene as of right, "the interest must be 'a legal interest as distinguished from interests of a general and indefinite character.'" *United States v. American Telephone and Telegraph Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980), *quoting Radford Iron Co. v. Appalachian Elec. Power Co.*, 62 F.2d 940, 942 (4th Cir. 1933). In many cases, especially class action litigation, the disposition of the action will have some impact on the interests of third

parties. To intervene as of right as a party to the litigation, however, the applicant must do more than show that his or her interests may be affected in some incidental manner. Rather, the applicant must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene. *See, e.g., United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978).

Ceilings on prison population are a common remedy in prison overcrowding cases. *See, e.g., Inmates of Allegheny County Jail v. Wecht*, 754 F.2d 120 (3d Cir. 1985); *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984); *Duran v. Elrod*, 713 F.2d 292 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108, 104 S. Ct. 1615, 80 L.Ed.2d 143 (1984). To the extent that the ceiling on the prison population, and any resultant release of inmates, may be required to maintain constitutional conditions in the prisons, the District Attorney has no legally protected interest in causing the constitutionally-imposed maximum to be exceeded. Simply stated, he can have no interest in assuring the incarceration of persons under unconstitutional conditions. *Cf. Stotts v. Memphis Fire Dept.*, 679 F.2d 579, 582 (5th Cir.), *cert. denied*, 459 U.S. 969, 103 S. Ct. 297, 74 L.Ed.2d 280 (1982) ("There is no legally cognizable interest in promotional expectations which presumptively could only occur as the result of discriminatory practices."). The District Attorney argues, however, that the attempt by the City to agree to a prison ceiling interferes with his duties and thus, he has a right to intervene in this action.

We are persuaded that the District Attorney's argument that he has a right to be a party to this litigation

overstates his role as the law enforcement officer of the Commonwealth. *But see Jackson v. Hendrick, supra,* 446 A.2d at 232-34 (1982) (Nix, J., dissenting) (release of pretrial detainees affects the District Attorney's functions).[12] The District Attorney's argument assumes that he has the right to oversee the entire criminal justice system in Philadelphia. Under Pennsylvania law, however, a number of different actors have legal duties with respect to the system of criminal justice. For example, it is the duty of the state court judges to determine the bail status of those accused, 42 Pa. Cons. Stat. Ann. § 1123 (Purdon Supp. 1986), and to set the sentences of those convicted. 42 Pa. Cons. Stat. Ann. § 9701 et seq. (Purdon 1982 and Supp. 1986. The Mayor and City Council, moreover, have the authority to determine the size of the police force through their control of the City budget. 351 Pa. Admin. Code §§ 2.2-300, 4.4-101 (1986). Any action by one of actors in the system is likely to have some repercussions in terms of the other actors' duties.

We must respect the boundaries that the Commonwealth has chosen to drawn [sic] as to the responsibilities of its public officials. But we decline to equate the District Attorney's function as the spokesperson for Pennsylvania's interest in criminal prosecutions with the responsibility for policing the entire criminal justice system. Although we agree with the District Attorney that the decree may result in some people not appearing for their

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12. The majority in *Jackson v. Hendrick,* 446 A.2d 226 (1982), denied the District Attorney's motion to intervene on the ground that the motion was untimely. It did, however, note that the District Attorney "has failed to establish that the denial of intervention has harmed his interest," because he received the opportunity to submit his views on the appropriateness of the remedy. 446 A.2d at 230 n. 12.

scheduled trial dates and some individuals not having to post bond before being released, this by-product of the decree is not sufficient to give the District Attorney the right to become a party to any consent decree entered in this case. *Cf. Graddick v. Alabama,* 453 U.S. 928, 934-35 (1981) (Powell, J., in chambers) (expressing his doubt that the Attorney General of Alabama had standing to seek a stay of a court order releasing inmates from prison when the Governor, who was vested with the responsibility for the prison system, opposed the Attorney General's motion); *but cf. Id.* at 941-43 (Rehnquist, J., in chambers) (explaining that he believes that the Attorney General has standing in light of his interest in law enforcement and the fact he was a party to the litigation).

Moreover, we reject the District Attorney's assertion that the City officials will be insensitive to concerns for public safety. Experience has demonstrated in similar cases that the officials in charge of the prisons are attuned to such concerns and will return to the court to seek a modification of the decree if the ceiling threatens the safety of the public. *See Duran v. Elrod,* 760 F.2d 756 (7th Cir. 1985).

We therefore conclude that the District Attorney has not asserted a sufficient interest to intervene in this action as of right. This conclusion, moreover, is consistent with the approach that other circuits have taken when a public official has petitioned to intervene as of right. Where the public official has demonstrated only a general interest in the litigation, his motion to intervene has been denied. *See, e.g., Blake v. Pallan, supra,* 554 F.2d at 953 (state securities commissioner does not have a sufficient

interest in class action suit merely because the action contains some pendent state claims); *People of State of California v. Tahoe Regional Planning Agency, supra,* 792 F.2d at 782.

On the other hand, courts have found that the official had a sufficient interest to intervene in cases in which the subject of the suit came within the scope of his official duties. In *Smith v. Pengilinan, supra,* for example, the Ninth Circuit concluded that the Attorney General, as the official charged with the administration of the nation's immigration laws, had a sufficient interest to intervene in an action in which the plaintiffs sought to have the court determine whether they were persons who would, in the future, be able to become United States citizens. *See also Hines v. D'Artois, supra,* 531 F.2d at 738 (state examiner for the Civil Service has right to intervene where relief sought by plaintiff involved changes in the civil service examination); *Neusse v. Camp, supra,* 385 F.2d at 700 (state banking commissioner had an interest in action in which the federal law incorporated the substance of the state law because the litigation involved "the nature and protection of the state policy"). Because we believe that the District Attorney's interests fall within the first category of cases, we find that the district court did not abuse its discretion in denying the motion to intervene as of right.

Given our conclusion that the District Attorney does not have a sufficient interest to intervene of right as a party in this action, it is not necessary to review the correctness of the district court's determinations that the District Attorney did not meet the other requirements of the intervention rule. Moreover, we need not reach the

issue of whether the district court abused its discretion in denying the District Attorney's motion for permissive intervention because he has not argued this issue on appeal and we deem it waived. *See United States v. Hooker Chemical & Plastics Corp., supra,* 749 F.2d at 969.

We would add that, although the District Attorney is not entitled to intervene as of right, we think it was entirely appropriate for the district court to permit the District Attorney to be heard on the terms of the consent decree, however his status may be otherwise legally characterized. Indeed, permitting persons to appear in court, either as friends of the court or as interveners for a limited purpose, may be advisable where third parties can contribute to the court's understanding of the consequences of the settlement proposed by the parties. *See, e.g., Kirkland v. New York State Dept. of Correctional Services,* 711 F.2d 1117, 1125-27 (2d Cir. 1983), *cert. denied sub nom. Althiser v. New York State Dept. of Correctional Services,* 465 U.S. 1005, 104 S. Ct. 997, 79 L.Ed.2d 230 (1984) (permitting nonminority employees to intervene to object to the affirmative action provisions in a proposed consent decree).

III.

The District Attorney also appeals the order of the district court approving the proposed consent decree. The source of the district court's authority to enter a consent decree is the parties' agreement. *See Local No. 93, International Association of Firefighters v. City of Cleveland,* — U.S. —, 106 S. Ct. 3063, 3076, 92 L.Ed.2d 405 (1986). As the Supreme Court has stated,

> Consent decrees are entered into by parties after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S. Ct. 1752, 1757, 29 L.Ed.2d 256 (1971).

Because a consent decree is an agreement between the parties to settle a case, one who is properly denied intervention cannot appeal the merits of the case. *See Commonwealth of Pennsylvania v. Rizzo, supra,* 530 F.2d at 508. The District Attorney's appeal of the merits, therefore, must be dismissed.[13]

In dismissing the District Attorney's appeal of the consent decree, we do not intend to imply that a district court can avoid its independent obligation to determine that, as a matter of subject matter jurisdiction, such terms "'come within the general scope of the case made by the pleadings.'" *Local No. 93, supra,* — U.S. —, 106 S. Ct. at 3077, 92 L.Ed.2d 405, *quoting Pacific R. Co. v. Ketchum,* 101 U.S. (11 Otto) 289, 297, 25 L.Ed. 932 (1880); *Sansom Committee v. Lynn,* 735 F.2d 1535, 1538 (3d Cir.); *cert. denied sub nom. Trustees of University of Pennsylvania*

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13. Given our determination as well as the district court's ruling on intervention, we reject the District Attorney's contention that by hearing him on the terms of the consent decree the district court, in effect, granted him limited intervention.

v. Sansom Committee, 469 U.S. 1017, 105 S. Ct. 431, 83 L.Ed.2d 358 (1984). That the relief comes within the scope of the pleadings, however, is not in question here. Moreover, because we conclude that the merits of the case are no properly before us, we are not called upon to decide in this case what legal and factual foundations are required for the district court to enter a consent decree.[14]

IV.

In light of the foregoing, the order of the district court denying the District Attorney's motion to intervene as of right will be affirmed.

The appeal of the District Attorney from the order of the district court approving the consent decree will be dismissed.

GARTH, J., *Circuit Judge*, Dissenting:

The District Attorney of Philadelphia has sought to intervene to prevent the release of prisoners from Philadelphia's jails and to prevent interference with his statutory duty to enforce the Commonwealth's criminal laws. The district court denied his right to intervene, and the majority of this court now sustains that position by holding that the District Attorney "has not asserted a sufficient interest to intervene in this action as of right . . .

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14. It is noteworthy that the district court conducted a careful examination of the proposed settlement before it approved the decree. The court toured the prisons, requested statistical information from the City defendants, and considered the written and oral contentions of the parties and the District Attorney. In addition, it filed a thirty one page memorandum opinion on February 19, 1987, explicating its conclusion that the settlement was fair, reasonable, adequate and in the public interest.

[because he has] demonstrated only a general interest in the litigation." Maj. Op., typescript at 26.

I dissent from the analysis and holding of the majority not only because I believe that the district court erred as matter of law[1] in not recognizing the right of the District Attorney to intervene, but also because I believe that a district court cannot enter a judgment, by consent or otherwise, which requires release of state prisoners or prohibits their entry into prison without a threshold finding that the conditions of confinement are unconstitutional.[2]

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1. The majority has purported to adopt an abuse of discretion standard for reviewing the denial of intervention of right. Maj. Op., typescript at 12-13. However, this standard apparently was not utilized because the majority recognized that an applicant *shall be permitted* to intervene if the requirements of Fed. R. Civ. P. 24(a) are satisfied.

I read this court's precedents as requiring plenary review over a district court's denial of a motion to intervene as of right. *See* Olden v. Hagerstown Cash Register, Inc., 619 F.2d 271, 275 (3d Cir. 1980) (denial of motion to intervene under Fed. R. Civ. P. 24(a) not an error; denial under Rule 24(b) not an abuse of discretion); Hoots v. Pennsylvania, 672 F.2d 1133, 1135 (3d Cir. 1982). However, I recognize that the sub-issue of timeliness of the application is reviewed under an abuse of discretion standard. Pennsylvania v. Rizzo, 530 F.2d 501, 502 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976). The majority, in its opinion, does not address the issue of timeliness, which I discuss *infra* note 3.

2. In Jackson v. Hendrick, 309 A.2d 187 (Pa. Cmwlth. 1973), a three-judge state court panel held that the conditions of confinement in the Philadelphia prison system amounted to cruel and unusual punishment. However, in Jackson v. Hendrick, 503 A.2d 400 (Pa. 1986), the Pennsylvania Supreme Court assumed extraordinary jurisdiction over the case and held that an Eighth Amendment violation must be judged under the "totality of the circumstances" test rather than the "one-man, one-cell" test that had been employed. The Pennsylvania Supreme Court remanded the proceeding to allow the Philadelphia Common Pleas Court to make factual findings employing the proper constitutional standards. Thus, at this point in time, and at the time of the district court's approval of the consent judgment, no findings of unconstitutional conditions have been made.

I.

The District Attorney is entitled to intervene as of right if three conditions are satisfied: (1) he must have a sufficient interest in the subject matter of the litigation, an interest that may as a practical matter be affected by the court's disposition of the case; (2) his interest must not be adequately represented by the existing parties; and (3) his application must have been timely. *Pennsylvania v. Rizzo*, 530 F.2d 501, 504 (3d Cir.), *cert. denied* 426 U.S. 921 (1976). Because the majority has chosen to decide this case on the first of the three intervention prongs, i.e. the sufficiency of the District Attorney's interest, I will similarly concentrate my analysis on this aspect of the appeal. In doing so, however, I observe that the record reveals, and I therefore conclude, that the District Attorney has satisfied all three of the requirements for intervention of right.[3]

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3. The second requirement for intervention, i.e., whether the interest of the intervenor is adequately represnted by existing parties, is governed by the discussion found in Commonwealth ex rel. Spector v. Bauer, 261 A.2d 573 (Pa. 1970). In *Bauer*, the court held that the Philadelphia City Solicitor was not an adequate representative of the Philadelphia District Attorney "when the District Attorney is engaged, pursuant to his statutory power, in fulfilling his historical duty of representing the Commonwealth's interest in the enforcement of its criminal laws." *Id.* at 576. To the extent therefore that the district court in this case based its denial of intervention on the ground that the District Attorney's interests were already adequately represented, I conclude that the court erred.

I also conclude that the third requirement for intervention was satisfied, i.e., that the application to intervene was timely. The motion to intervene came within three days of the submission of Proposed Consent Decree I, and was contemporaneous

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I agree with the majority's statement that, if the District Attorney's "rights and duties, as defined by Pennsylvania law, may be affected directly by the disposition of this litigation, the District Attorney has a sufficient interest to intervene as of right in this action." Maj. Op., typescript at 13. But the majority's conclusion that the District Attorney lacks such an interest in this case is utterly at odds not only with this standard, but also with the intent of Federal Rule of Civil Procedure 24(a),[4] to say nothing of its clear language.

> Prior to the 1966 amendment of Rule 24 . . . the pre-amendment Rule required that the applicant might be "bound" by the judgment in the pending action and the prevailing weight of authority interpreted this test to mean bound in the res judicata sense. *See, e.g., Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 81 S. Ct. 1309, 6 L. Ed. 2d 604 (1961). The changes wrought in Rule 24(a) have repudiated that narrow approach in general, and *Sam Fox* in particular. The Rule now specifies only that the "disposition of the action may as a practical matter impair or impede his

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with the beginning of the new negotiations which ultimately led to the Consent Decree adopted by the parties and entered by the court. Moreover, when the District Attorney moved to intervene, there had been no discovery taken, no motions filed, no legal rulings entered, and no class certification approved. To the extent therefore that the district court based its denial of intervention on the grounds of untimeliness, I conclude that the court abused its discretion.

4. Rule 24(a) provides in relevant part: "**Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

> ability to protect" the applicant's interest. This alteration is obviously designed to liberalize the right to intervene in federal actions. Interestingly, an earlier draft would have required that the judgment "substantially" impair or impede the interest, but that higher barrier was deleted in the course of approving the amendment.

Nuesse v. Camp, 385 F.2d 694, 701 (D.C. Cir. 1967). *See also* 7C C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, § 1908 at 301.[5] I agree with the conclusions of the District of Columbia Circuit and the treatise authors, that "the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse*, 385 F.2d at 700.

Reason, common sense, and logic compel the conclusion that, under these liberal intervention standards and in a case of such exceptional public importance to the Philadelphia citizenry as the instant proceeding, the Philadelphia District Attorney, who is the single City official most directly responsible for the enforcement of the criminal laws, has a sufficient interest in this litigation to intervene by right. The District Attorney must be permitted to intervene not only to represent his interest and the public interest in the enforcement of the Commonwealth's laws,

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5. Wright, Miller, and Kane, interpreted the 1966 amendment as rejecting any res judicata rule: "The central purpose of the 1966 amendment was to allow intervention by those who might be practically disadvantaged by the disposition of the action and to repudiate the view, expressed in authoritative cases under the former rule, that intervention must be limited to those who would be legally bound as a matter of res judicata." 7C C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, § 1908 at 301.

but also to prevent interference with his legislatively assigned functions.

The interest of the District Attorney is far from the general interest attributed to him by the majority. *See* maj. op., typescript at 24-26. Rather it is a particularized interest, delineated by state statute and case law, under which the Pennsylvania Legislature has assigned to the District Attorney *specific* functions relating to the prosecution of criminals and the defense of sentences lawfully imposed upon completion of successful prosecutions. There can be no doubt that the District Attorney's ability to effectively carry out his prosecutorial duties and responsibilities is, as a practical matter, impaired and impeded by the Consent Decree entered in this lawsuit.

Under Pennsylvania statutes the District Attorney is given sole responsibility for enforcing the criminal laws in the county in which he serves.[6] The District Attorney is responsible for prosecuting those charged with criminal violations, defending convictions in post-verdict proceedings, advocating the amount at which bail should be set, and defending the committing magistrate's bail decisions.

Each of the two proposed Consent Decrees presented to the district court in this case, implicates these prosecutorial interests of the District Attorney. In addition to population ceilings, proposed Consent Decree I imposed specific

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6. 16 Pa. S.A. § 1402(a) provides: "The district attorney shall sign all bills of indictment and conduct in court all criminal and other prosecutions, in the name of the Commonwealth, or, when the Commonwealth is a party, which arise in the county for which he is elected, and perform all the duties which now by law are to be performed by deputy attorneys general, and receive the same fees or emoluments of office."

time constraints and duties on the District Attorney. It required, for the first time, that criminal defendants receive their preliminary hearings within 21 days of incarceration, that a municipal court trial be held within 120 days of some unspecified point, that a Common Pleas trial be held within 180 days of the filing of the complaint, that a probation revocation hearing be held within 60 days of arrest, and that sentencing occur within 120 days of conviction.[7]

Because the District Attorney would have been the primary person responsible for meeting the deadlines imposed by proposed Consent Decree I, there can be little question but that the District Attorney's ability to carry out his official duties was directly impaired by the proposed settlement. Moreover, because proposed Consent Decree I mandated the automatic release of prisoners whose hearings or trials were not held within the required time periods, the decree denied the District Attorney his statutory right to object to the release of dangerous pris-

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7. In deciding whether the District Attorney has sufficient interest to intervene in this suit, it is appropriate for this court to consider both proposed Consent Decree I and the subsequently approved Consent Decree II. A potential intervener's interest must be judged in light of the full range of remedies that were being considered when he sought intervenor's status.

Moreover, it was apparently the District Attorney's "limited intervention" in the parties' original settlement discussions that led to the elimination from proposed Consent Decree I of the objectionable time constraints. It was obviously clear to the parties that the District Attorney had a vital interest in the proposed consent decree. Yet, when the District Attorney sought formal intervention to protect these same vital interests, the district court upheld the parties' opposition to his intervention, finding among other things, a lack of the necessary interest. I find this result totally lacking in reason and logic.

oners. *In Re Miller,* 224 A.2d 89, 90 (Pa. Super. 1966) (16 Pa. S.A. § 1402 imposes upon the District Attorney the duty to represent the Commonwealth with respect to discharge of inmates from state correctional institutions).

The Consent Decree approved by the district court (proposed Consent Decree II) did not contain the restrictive time limits of proposed Consent Decree I, but it did not eliminate all of the proposals objected to by the District Attorney. Most importantly, the Consent Decree entered by the court retained the population ceilings and automatic release provisions from proposed Consent Decree I, the very provisions to which the District Attorney has continuously and strenuously objected since Consent Decree I was proposed.

These population caps and release provisions necessarily have a direct impact on the District Attorney's ability to exercise his prosecutorial functions. Under the Consent Decree entered by the court, it is expected that the population caps will be effectuated first through bail reductions and early release of sentenced prisoners, and later, if necessary, through non-admission of new inmates. App. at 1096. There can be no reasonable doubt that the District Attorney's ability to successfully and effectively prosecute criminals is directly impeded and intruded upon through an agreement of this type. The Consent Decree's requirement of more extensive pre-trial release of individuals facing prosecution can have no effect other than to insure that fewer individuals charged with a crime will actually appear for trial. Second, as discussed above, the proposal renders nugatory the District Attorney's hitherto unquestioned responsibilities in making bail recommendations.

Finally, it strains common sense beyond all ascertainable bounds for the majority to fail to recognize that the District Attorney's prosecutorial function is effectively destroyed by an agreement that can preclude incarceration for newly convicted felons. Under the Consent Decree, the City defendants will be seeking the release of approximatly 550 additional inmates who are not eligible for release under any Commonwealth approved early release program. When the non-admission provisions of the Consent Decree are activated, although defendants charged with certain enumerated crimes will be excepted from these provisions, neverthless the Commonwealth will be precluded from incarcerating defendants *charged* with or *convicted* of, among other crimes, attempted murder, attempted rape, kidnapping, involuntary deviate sexual intercourse, robbery, aggravated assault, or narcotics sales.

The Pennsylvania courts themselves have explicitly recognized the undeniable interests that the District Attorney has in prison litigation which implicates population ceilings and prisoner releases. In *Jackson v. Hendrick*, the complementary state action, the Pennsylvania Court of Common Pleas issued a remedial decree in the context of an earlier court determination that unconstitutional conditions of confinement prevailed. *See* note 2, *supra*. That decree established maximum capacity at the prisons, prohibited double celling, and established procedures for the release of inmates held on bail until the prison population was not in excess of capacity. *Jackson v. Hendrick,* 456 A.2d 229, 230 (Pa. Cmwlth. 1983). The District Attorney sought to intervene in those proceedings, and his request to intervene was denied. However, it is clear that this denial was based solely on *timeliness* grounds, for the Com-

monwealth court recognized the important *interest* of the District Attorney in the subject matter of the dispute. "We recognize, of course, that the remedy ordered in this case *affects the prosecutorial interests* of the District Attorney. But while his involvement may have justified intervention had his application been timely, it does not fall within the purview of Pa.R.C.P. No. 2252 [governing joinder]." 456 A.2d at 233 (emphasis added).

Likewise, *In re Miller,* 224 A.2d 89 (Pa. Super 1966), recognized the District Attorney's strong interest, and necessary party status, in cases involving the release of prisoners from state correctional institutions. *In re Miller* involved an appeal by the Commonwealth from an order of a Philadelphia County Court discharging Miller from a state correctional institution. Miller's counsel had argued that the District Attorney was not a proper party to dispute the release. The court disagreed, relying on the 16 Pa. S.A. § 1402, which sets forth the general duties of the District Attorney.[8] The court held that one of the District Attorney's duties was the duty to represent the Commonwealth generally in the administration of justice. More specifically, the court held that it was the District Attorney's duty to represent the Commonwealth with respect to discharge of inmates from state correctional institutions. *Miller,* 224 A.2d at 90.

Finally, whether or not there are "other actors" who might have legal duties with respect to the system of criminal justice, *see* maj. op., typescript at 24-25, cannot de-

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8. See note 6, *supra,* for the relevant portions of 16 P.S. § 1402.

tract from the specific legal duties which the Pennsylvania Legislature has chosen to impose upon the District Attorney. I do not believe that the District Attorney here is seeking to "police the entire criminal justice system" of Philadelphia County, as the majority contends. Indeed, the District Attorney has conceded throughout this litigation that he has no interest in conditions of confinement, per se, and therefore he does not object to those portions of the Consent Decree concerned with, for example, prohibitions against double-celling, permissible housing areas, and the requirements for bedding materials.

In my view, the District Attorney is quite properly seeking to intervene for the purpose of contesting only those portions of the Consent Decree that directly affect his ability to carry out his prosecutorial functions. I am therefore satisfied that the district court erred as a matter of law in not recognizing the right of the District Attorney to intervene.

II.

The majority opinion does not reach the merits of the District Attorney's objections to the settlement. Because I would hold that the District Attorney was improperly denied the right to intervene, I find that he is a proper party to object to the settlement on appeal, and I therefore consider his substantive objections.

I conclude that the district court lacked the power to issue an order, by consent or otherwise, under which these defendants agreed to either release validly sentenced state prisoners or prohibit their entry into prison without a threshold finding that the conditions of confinement were unconstitutional. It is undisputed that no such finding has

been made here. Indeed, on the record before this court, it is highly questionable whether the plaintiffs have even established a prima facie case in support of their allegation of unconstitutional conditions of confinement. *See Jackson v. Hendrick,* 503 A.2d 400 (Pa. 1986) (remanding on the basis of *Rhodes v. Chapman,* 452 U.S. 337 (1981)). *See also, Union County Jail Inmates v. DiBuono,* 713 F.2d 984 (3d Cir. 1983), *cert. denied,* 465 U.S. 1102 (1984). Therefore, I believe that the district court lacked the power to approve the Consent Decree.

A.

Absent a finding of unconstitutionality in the conditions of confinement, the federal courts have no business interfering in state penal matters. A federal court has no power to order release of validly sentenced state prisoners unless they are being held in violation of their constitutional rights. Indeed, I have discovered no case in which a district court has been permitted to order the release of lawfully incarcerated state prisoners absent a finding of unconstitutional conditions. Nor has the majority cited to any such authority.

The majority's statement, that "the District Attorney has no legally protected interest in causing the *constitutionally-imposed maximum* to be exceeded," maj. op., typescript at 23 (emphasis added), quite simply puts the rabbit in the hat. As discussed above, all parties agree that the District Attorney has no interest in the conditions of confinement, per se. But there has been no finding that the conditions of confinement violate the federal Constitution. To the contrary, the most recent consideration of prison

conditions by the Supreme Court of Pennsylvania has, in effect, reversed the earlier determination of unconstitutionality and has remanded the issue to the lower court for application of the correct constitutional standards. *See* note 2, *supra.*

Of course, in the instant case, the district court has not itself directly ordered the release of prisoners. Instead the court has approved a Consent Decree by which the City defendants themselves agree to such a release. But the problem remains because nothing appears of record which demonstrates that the City defendants themselves have the power under law to agree to the release of validly sentenced prisoners or lawfully held pre-trial detainees.

It is elementary that a district court cannot approve a consent order, and thereby give a judicial imprimatur of approval to an agreement which goes beyond the power of the consenting parties to make. *See, e.g., Overton v. City of Austin,* 748 F.2d 941 (5th Cir. 1984) (in suit alleging discriminatory at-large election system, absent a finding of illegality in present charter provisions, district court properly refused to approve consent agreement that was beyond power of parties to themselves achieve).

B.

It is beyond dispute that a federal court has the power to release state prisoners who are being improperly held under unconstitutional conditions of confinement. It is also true that the Philadelphia Department of Public Welfare has the power to consent to population ceilings for the prisons under its own supervision, *see* 351 Pa. Code § 5.5-700(c). Any such freely adopted City prison population

ceilings can therefore cap the population at any particular City prison at a lower figure than what would be the "constitutionally permissible maximum" (assuming arguendo that such a concept has any meaning given that the constitutionality of conditions of confinement must be judged under "the totality of the circumstances" standard rather than a per se standard such as "one man-one cell"). But the fact that the City defendants are empowered to set population caps for each Philadelphia prison that they supervise, does not mean that the City defendants can *release* prisoners when those caps are exceeded. Indeed, I do not understand the District Attorney to challenge the function of the City defendants in determining the capacity of the City prisons so long as all prisoners are accommodated and are not prematurely released or refused admission. The District Attorney can have no interest in the management of the City prisons. But the *power to manage* the City prisons is not the same as the *power to release* or the *power to refuse to admit* validly sentenced prisoners. It is for that reason that the District Attorney centers his attack on the Consent Decree on only those provisions dealing with release and non-admission of prisoners.

In fact, it is unclear to me which actor or actors in Pennsylvania have the power to revoke the valid sentences of prisoners--for that is the practical effect of releasing prisoners prior to the service of the term to which they were sentenced. One possibility is that the judges of the Commonwealth are necessary parties in any suit seeking the release of validly sentenced prisoners. The District Attorney vigorously asserts that his statutory role in the bail and sentencing processes makes him a necessary party to any such agreement. Indeed, it is also possible that,

absent a finding of unconstitutional conditions of confinement, no single actor or group of actors has the power to reduce or rescind validly imposed sentences.[9] This, however, is not a question that I must reach. For my purposes, it is sufficient to note that the record discloses no evidence to support the contention that the release of prisoners is within the power of any of the present defendants who, by the Consent Decree, seek to exercise that power.

Under my analysis, therefore, the City defendants are fully within their rights to agree to the population caps in the Consent Decree. And the district court had the authority to approve that portion of the Consent Decree embodying the population caps. But the City defendants could not arrogate to themselves a power that they did not possess, i.e. the power to release prisoners or refuse to admit prisoners to the City prisons if these self-imposed population limits were exceeded. This being so, the district court lacked the power to approve such an agreement.

Thus, had the district court approved a consent agreement that provided for population ceilings alone--without any provision for the release of prisoners or the non-admittance of defendants as a remedy in the event the ceil-

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9. I note that under the Federal Rules, judges are entitled to reduce sentences only within 120 days of the imposition of sentence. Fed. R. Crim. P. 35(b). Pennsylvania's Rules appear to be even more restrictive. Under Pa. R. Crim. P. 1410, sentences may be modified by motion of defendants made within 10 days after imposition of sentence. While this rule does not limit the court's inherent power to correct an illegal sentence at any time, *see* Commonwealth v. Cole, 263 A.2d 339 (Pa. 1970), it is unclear whether the judiciary retains the power to reduce a validly entered sentence beyond the ten day period specified by the rules, absent a finding of unconstitutional or other illegal conditions of confinement.

ings were exceeded--such an order would have been appropriate. The cases cited by the majority, *see* maj. op., typescript at 23, are not to the contrary.

Inmates of Allegheny County Jail v. Wecht, 754 F.2d 120 (3d Cir. 1985), did affirm the imposition of population ceilings, but in that case, a violation of the federal Constitution had been found. Therefore, *Inmates of Allegheny County* has no relevance to the instant proceedings, where no such unconstitutional finding has been made.

Badgley v. Varelas, 729 F.2d 894 (2d Cir. 1984), implicitly recognized the limitations on a federal court to provide release and non-admittance remedies where no finding of unconstitutionality had been made. In *Badgley,* the court rejected the remedy of prisoner release, and it accepted the remedy of a ban on new admissions only because it was satisfied that the responsible state officials would confine those who were arrested by the police and sentenced by the courts, if not in one state prison, then in another. *See* 729 F.2d at 902 & n.9. Thus, *Badgley* provides no support for the proposition that, absent a finding of unconstitutional conditions of confinement, a federal court has the power to enter an order that would undermine legitimate state sentences or pre-trial detention orders imposed by the state judiciary.

Duran v. Elrod, 713 F.2d 292 (7th Cir. 1983), *cert. denied,* 465 U.S. 1108 (1984), as cited by the majority, ignores the subsequent developments that took place and which resulted in the later case of *Duran v. Elrod,* 760 F.2d 756 (7th Cir. 1985) (Posner, J.), which reversed the district court's failure to modify a consent decree allowing for the early release of pre-trial detainees. It is apparent

that the later *Duran* case was uncomfortable with the earlier affirmance of the consent decree entered in that case because there had been no unconstitutional finding made by the court when the decree had been approved. *See* 760 F.2d, at 759, 763. Thus, whatever may have been deemed an appropriate remedy by the first *Duran* court was questioned and then rejected by Judge Posner in the second *Duran* case.

Thus, I conclude that no authority exists which will permit a federal court either to reduce valid sentences of state prisoners via a premature release mechanism or to prevent admission to prisons of persons lawfully held absent a finding of unconstitutional conditions of confinement in the state prison system. Other remedies obviously may be imposed, but those remedies cannot provide for the release of prisoners or the non-admission of defendants.

III.

Just as I dissented in *Harris v. Pernsley I*, 755 F.2d 338 (3d Cir. 1985); 758 F.2d 83 (3d Cir. 1985) (sur petition for rehearing), because I felt strongly then as I do now that the federal courts had no business running state prisons when the state was actively correcting conditions to meet constitutional standards,[10] so too I dissent here where

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10. In Harris v. Pernsley I, 755 F.2d 338 (3d Cir. 1985), fifty percent of the judges on this court (one short of the majority needed to order rehearing in banc) voted to reconsider a panel decision which ordered the federal courts to supervise the Commonwealth's conduct of its own prison system, thereby reversing the district court's decision to abstain in that proceed-

(Continued on next page)

the majority has failed to acknowledge the overriding necessity of a federal court to find unconstitutional conditions before it enters judgments affecting state prison populations.

Moreover, the majority's refusal to accord recognition to the legislative mandate with which the District Attorney was invested by the Commonwealth of Pennsylvania, to enforce and prosecute under the state's criminal laws, can only disrupt further the comity which the Supreme Court has been assiduous in recognizing and promoting. The failure to permit intervention here does a disservice to the citizens of the Commonwealth and warrants the full court's attention on this issue of "exceptional importance."[11]

(Continued from previous page)

ing. My dissent in that case identified the overriding principle that a state court in a state system should be the predominant actor in determining how to correct conditions of confinement in a state system. *See Harris v. Pernsley I*, 758 F.2d 83 (3d Cir. 1985) (sur petition for rehearing).

Just as the petition for rehearing failed by only one vote, so too did the petition for certiorari. Pernsley v. Harris I, 106 S. Ct. 331 (1985). Thus, the federal district court was forced to assume the position of overseer of the Commonwealth's prison facilities. It did so even though no finding of unconstitutional conditions was made. Indeed to this very day, no court has ever made such a finding.

11. Rehearing in banc is appropriate when "(1) consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceedings involves a question of exceptional importance." Fed. R. App. P. 35(a); Third Circuit Internal Operating Procedures, Chapter 8(B).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1025

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD RUTICK, CHARLES OAKES, EMANUEL GARDNER

v.

IRENE PERNSLEY, individually and in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official cacapacity as a member of the Board of Trustees of the Philadelphia Prison System, DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, GUETON CURIONE, individually and in his official capacity as Warden of Holmesburg Prison, PHILLIP DUKES, individually and in his official capacity as Warden of the Detention Center, JOHN DAUGHEN, individually and in his official capacity as Warden of the House of Corrections, RODNEY D. JOHNSON, individually, LEO C. BROOKS, individually, JAMES S. WHITE, individually and in his official capacity as Managing Director of the City of Philadelphia, WILLIAM J. GREEN, individually, HON. WILSON GOODE, individually and in his official capacity as Mayor of Philadelphia, CITY OF PHILADELPHIA, JAY C. WALDMAN, individually and in his official capacity as General Counsel

for the Commonwealth of Pennsylvania, RONALD J. MARKS, individually, GLEN JEFFES, individually and in his official capacity as Commissioner of the Pennsylvania Department of Corrections

RONALD D. CASTILLE, District Attorney of Philadelphia County, Proposed Intervenor,

Appellant

(D. C. Civil No. 82-1847)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, *Chief Judge,* SEITZ and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel March 3, 1987.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 31, 1986, be, and the same is hereby affirmed. It is further ordered and adjudged that the appeal of the District Attorney from the order of the said District Court approving the consent decree is dismissed. Costs taxed against the appellant.

ATTEST:
/s/ Sally Mrvos
Clerk

May 15, 1987

Costs taxed in favor of the Appellee as follows:

Brief	$279.40
Aplee's Reply Brief	$160.60
TOTAL	$440.00

Certified as a true copy and issued in lieu of a Formal Mandate on June 23, 1987

Test: M. Elizabeth Ferguson
Chief Deputy Clerk, United States Court of Appeals for The Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1025

Martin Harris et al

vs.

Irene Pernsley, et al

Ronald D. Castille, Appellant

Present: GIBBONS, *Chief Judge*, SEITZ and GARTH, *Circuit Judges*

1. Motion for Continuance of Stay Pending Rehearing, by the Appellant.

Answer due in the above,

June 5, 1987

/s/ Barbara Jacobson
Deputy Clerk
Direct Dial 597-3134

ORDER

Ordered that the motion for continuance of stay until the entry of the order disposing of the pending petition for rehearing is granted. Chief Judge Gibbons would deny the motion.

By the Court,

/s/ Seitz
Circuit Judge

Dated: JUN 9, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1025

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD RUTICK, CHARLES OAKES, EMANUEL GARDNER

v.

IRENE PERNSLEY, individually and in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDELL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, GUETON CURIONE, individually and in his official capacity as Warden of Holmesburg Prison, PHILLIP DUKES, individually and in his official capacity as Warden of the Detention Center, JOHN DAUGHEN, individually and in his official capacity as Warden of the House of Corrections, RODNEY D. JOHNSON, individually, LEO C. BROOKS, individually, JAMES S. WHITE, individually and in his official capacity as Managing Director of the City of Philadelphia, WILLIAM J. GREEN, individually, HON. WILSON GOODE, individually and in his official capacity as Mayor of Philadelphia, CITY OF PHILADELPHIA, JAY C. WALDMAN, individually and in his official capacity as General Counsel for the Commonwealth of Pennsylvania, RONALD J. MARKS,

individually, GLEN JEFFES, individually and in his official capacity as Commissioner of the Pennsylvania Department of Corrections

RONALD D. CASTILLE, District Attorney of Philadelphia County, Proposed Intervenor,

Appellant

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge,* SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN and GARTH, *Circuit Judges.*

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Weis and Judge Becker would have granted rehearing in banc.

Judge Garth would grant the petition for panel rehearing for the reasons set forth in his attached statement.

By the Court,

/s/ Collins J. Seitz
Circuit Judge

DATED: JUN 15, 1987

GARTH, J., *dissenting*:

As a Senior Circuit judge, I am permitted to vote for panel rehearing, and I do so in this case. In my opinion,

the decision of the majority constitutes an unwarranted intrusion by a federal court into the Commonwealth's prison system before any determination has ever been made that the Commonwealth has violated the Federal Constitution. Not only did the majority ignore the threshold requirement that a finding of unconstitutionality is a prerequisite to federal court oversight, but in addition it erred by refusing to permit the District Attorney of Philadelphia, an indispensible party, to intervene in this federal action. Despite the District Attorney's absence from the federal proceeding, the majority has approved the release from state prison and the non-admission to state prison, of state criminal defendants over whom the federal courts have no authority, absent some violation of the Federal Constitution. As stated, no such violation has as yet been found.

In derogation of Pennsylvania statutes and caselaw, the majority has refused to permit the Philadelphia District Attorney to be heard on a settlement between the prisoners and the City that directly and substantially impinges upon his statutory Commonwealth duties. *See Commonwealth ex rel. Spector v. Bauer,* 261 A.2d 573 (Pa. 1970) (District Attorney has "power and duty to represent the Commonwealth's interest in the enforcement of its criminal laws"); *In re Miller,* 224 A.2d 89 (Pa. Super. 1968) (District Attorney has duty to represent Commonwealth with respect to the discharge of inmates from state correctional institutions); *Jackson v. Hendrick,* 456 A.2d 229 (Pa. Cmwlth. 1982) (pre-release of detainees "affects the prosecution interests of the district attorney").

Moreover, in approving the denial of the District Attorney's motion to intervene as of right, the majority has

employed an erroneous standard of review. As I pointed out in my panel dissent, *Harris v. Pernsley*, No. 87-1025, slip op. at 28 n.1 (3d Cir. May 15, 1987) this court's precedents require *plenary* review over a district court's denial of a motion to intervene as of right. *See Olden v. Hagerstown Cash Register, Inc.*, 619 F.2d 271, 275 (3d Cir. 1980) (denial of motion to intervene under Fed. R. Civ. P. 24(a) not an error; denial under Rule 24(b) not an abuse of discretion); *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982). In disregard of these authorities and of this court's Internal Operating Procedures, *see* Third Circuit Internal Operating Procedures, Chapter 8(C), which forbid deviation from a prior precedent of the court without in banc review, the majority has abandoned this court's standard of plenary review and instead has tested the district court's ruling which denied intervention of right under an abuse of discretion standard.[1]

Each of these issues by itself warrants rehearing. Each meets the standard of exceptional importance and the need to maintain uniformity of the court's decisions. *See* Fed. R. App. P. 35(a); Third Circuit Internal Operating Procedures, Chapter 8(B). When both issues are pre-

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1. The majority's decision to adopt an abuse of discretion standard of review also conflicts with decisions in several other circuits. *See* County of Orange v. Air California, 799 F.2d 535, 537 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1605 (1987); H.L. Hayden Co. v. Siemens Medical Systems, Inc., 797 F.2d 85, 87 (2d Cir. 1986); United States v. Allegheny Ludlum Industries, 517 F.2d 826, 841 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); Central States, Southeast & Southwest Areas Health & Welfare Fund v. Old Security Life Insurance, 600 F.2d 671, 679 n.15 (7th Cir. 1979). *See also*, Shreve, *Questioning Intervention of Right—Towards a New Methodology of Decision Making*, 74 Nw. U.L. Rev. 894 (1980) (recommending that Rule 24 be *redrafted* to make intervention of right subject to trial court discretion).

sented in tandem, as they are in this case, it would seem that these questions *must* be examined by the full court.

Were I permitted to vote for rehearing in banc, I would do so. As a senior circuit judge however, I am remitted to voting only for panel rehearing. I so vote.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1025

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD RUTICK, CHARLES OAKES, EMANUEL GARDNER

v.

IRENE PERNSLEY, individually and in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System, DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, GUETON CURIONE, individually and in his official capacity as Warden of Holmesburg Prison, PHILLIP DUKES, individually and in his official capacity as Warden of the Detention Center, JOHN DAUGHEN, individually and in his official capacity as Warden of the House of Corrections, RODNEY D. JOHNSON, individually, LEO C. BROOKS, individually, JAMES S. WHITE, individually and in his official capacity as Managing Director of the City of Philadelphia, WILLIAM J. GREEN, individually, HON. WILSON GOODE, individually and in his official capacity as Mayor of Philadelphia, CITY OF PHILADELPHIA, JAY C. WALDMAN, individually and in his official capacity as General Counsel for the Commonwealth of Pennsylvania, RONALD J. MARKS,

individually, GLEN JEFFES, individually and in his official capacity as Commissioner of the Pennsylvania Department of Corrections

RONALD D. CASTILLE, District Attorney of Philadelphia County, Proposed Intervenor,

Appellant

Present: GIBBONS, *Chief Judge* and SEITZ and GARTH, *Circuit Judges.*

ORDER

ORDERED that the order granting the continuance of a stay in the above matter pending the disposition of the petition for rehearing is hereby vacated.

By the Court,

/s/ Collins J. Seitz
Circuit Judge

DATED: JUN 15 1987

SUPREME COURT OF THE UNITED STATES

No. A-69

RONALD D. CASTILLE, DISTRICT ATTORNEY, PHILADELPHIA COUNTY,

Applicant,

v.

MARTIN HARRIS, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the application for recall and stay of mandate is referred to the Court for disposition. Pending action by the Court, the judgment and mandate of the United States Court of Appeals for the Third Circuit are stayed. It is requested that responses to the application be filed on or before July 30, 1987.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 23rd day of July, 1987.

A true copy JOSEPH F. SPANIOL, JR.
Test:

Clerk of the Supreme Court of the United States

By /s/ C. W. Vasil, Deputy

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

August 3, 1987

Gaele McLaughlin Barthold, Esquire
Assistant District Attorney
1300 Chestnut Street
Philadelphia, PA 19107

Re: Ronald D. Castille, District Attorney, Philadelphia County v. Martin Harris, et al., A-69

Dear Ms. Barthold:

The Court today entered the following order in the above-entitled case:

"The application for recall and stay of mandate presented to Justice White and by him referred to the Court is denied. The temporary stay heretofore entered on July 23, 1987 is vacated and the application for recall and stay is, in all respects, denied."

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk
By /s/ Edward L. Turner, Jr.
Edward L. Turner, Jr.
Assistant Clerk

vjr

cc: David Richman, Esq.
Richard J. Gold, Esq
Carl Vaccaro, Esq.
Rosalyn Robinson, Esq.

Clerk, U.S. Court of Appeals for the Third Circuit
(Your No. 87-1025)

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(Your Civil Action No. 82-1847)

EXCERPTS FROM BRIEF FILED BY CITY OFFICIAL DEFENDANT-RESPONDENTS IN JACKSON V. HENDRICK

IN THE SUPERIOR COURT OF PENNSYLVANIA

GERALD JACKSON, et al. Appellees/Plaintiffs	:	No. 2910— Phila., 1984
v.	:	
EDWARD J. HENDRICK, et al.	:	
	:	
HONORABLE W. WILSON GOODE, et al. Appellants/Defendants	:	

BRIEF FOR APPELLANT

APPEAL FROM ORDERS OF JUNE 22, 1984 AND OCTOBER 11, 1984 OF THE PHILADELPHIA COURT OF COMMON PLEAS, TRIAL DIVISION, FEBRUARY TERM, 1971, NO. 2437

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III. *THE CITY HAS NO LEGAL AUTHORITY TO RELEASE PRISONERS BECAUSE THE LOWER COURT HAS NO JURISDICTION OR AUTHORITY TO CONTRAVENE ORDERS OF TRIAL JUDGES OF THE PHILADELPHIA COURT OF COMMON PLEAS.*

As explained above in Section I, strict implementation of the June 22, 1984 population caps will require the City to either release prisoners in a wholesale manner or accept contempt fines of forty-five dollars per prisoner per day above the prescribed caps, in addition to other various monetary amounts. Since the City cannot possibly absorb such fines, it faces the inevitable prospect of compliance by release. If the June 22, 1984 order requires release, it will do so by, in effect, either reducing inmate sentences, ordering early parole, or modifying the bail orders of other Philadelphia Common Pleas courts. These modifications, however, are unlawful because the trial court in this case has neither the jurisdiction nor the lawful power to modify the valid incarceration orders of other courts.

A. The Lower Court Had No Power to Modify Valid Sentences Imposed By Trial Judges of the Philadelphia Court of Common Pleas

Pennsylvania law endows the state legislature with exclusive power to determine the structure and workings of the penal system in this state. The structure of the penal system includes, among other things, the prescription of punishments, the delegation of sentencing discretion to the courts, and the organization of a system of parole, probation, or imprisonment. *Banks v. Cain,* 345 Pa. 581, 587, 28 A2d 897 (1942) (legislature determines penal system, prescribes punishments, determines what discretion to give judges, and determines circumstances for granting pardon or for imposing imprisonment). *See also, Commw. ex. rel. Green v. Keenan,* 176 Pa. Super. 103, 106, 106 A2d 896 (1954) (legislature has exclusive power to prescribe system of criminal punishments and may provide fixed penalties or may grant such discretion to courts as it sees fit). Pursuant to its authority, the Pennsylvania legislature has granted sentencing power only to the criminal trial judge.[8] Specifically, 42 Pa.C.S.A. § 9751 (Purdon's 1983 Pamphlet) states that the judge who presided at the criminal trial and received the defendant's plea shall impose the sentence absent compelling reasons to preclude the judge's presence. *See also,* Pa.R.Crim.P. 1401 (trial judge to impose sentences); *United States ex rel. Thompson v. Rundle,* 294 F.Supp. 933, 935 (E.D.Pa. 1968) (sentencing function more completely committed to the discretion of trial judge than any other area of judicial function); *Commw. v. Plank,* 498 Pa. 144, 145, 445 A2d 491, 492 (1982) (imposition of sentence vested in discretion of trial court); *Commw. v. Thompson,* 328 Pa. 27, 31, 195 A. 115 (1937) (sentencing

is a judicial act of serious import in the administration of justice and can be performed only by judge who tried case except in cases of imperative necessity); *Commw. v. Turecki,* 278 Pa. Super. 511, 517, 420 A2d 658 (1980) (sentencing judge responsible for evaluating circumstances of the offense and character of the defendant in formulating sentence); *Commw. v. Vagnoni,* 272 Pa. Super. 396, 400, 416 A2d 99 (1979) (rules of criminal procedure may not be ignored, and only trial judge may impose sentence). *Accord, Commw. v. High,* 304 Pa. Super. 174, 450 A.2d 158 (1982); *Commw. v. Ellison,* 293 Pa. Super. 329, 339, 448 A2d 136 (1982); *Commw. v. Corson,* 298 Pa. Super. 51, 444 A2d 170 (1982); *Commw. v. Gillespie,* 292 Pa. Super. 326, 434 A2d 781 (1981); *Commw. v. Rhoads,* 227 Pa. Super. 197, 323 A2d 249 (1979).

In fact, the Pennsylvania Supreme Court has said that parties to litigation, including the Commonwealth, have an undoubted right to have the trial judge *alone* impose sentence on a defendant. *Commw. v. Thompson,* 328 Pa. 27, 31, 195 A2d 115 (1937). In imposing sentences, a trial judge must consider a complex range of factors affecting public safety, punishment, rehabilitation of the criminal, and the interests of justice. *See,* 10 Pa.C.S.A. §§ 1322-26 (transferred); 42 Pa.C.S.A. § 7222-26 (Purdon's 1983 Pamphlet). Because of the criminal trial judge's superior ability to assess and to decide these factors, Pennsylvania law clearly directs that the sentence of the trial judge will not be disturbed or modified absent an abuse of discretion by the sentencing judge. *Commw. v. Plank, supra* at 145, 445 A2d 491, 492 (1982); *Commw. v. Green,* 494 Pa. 406, 431 A2d 918, 920 (1982); *Commw. v. Martin,* 466 Pa. 118, 131, 351 A2d 650 (1976); *Commw. v. Zelnick,*

202 Pa. Super. 129, 195 A2d 171 (1963), *cert. den.* 377 U.S. 1006 (1964). No such abuse by the sentencing judges has been alleged here.

The June 22, 1984 order acts completely outside of and, in fact, contrary to, the penal scheme devised by the legislature; to the extent that it requires the early release of sentenced inmates, the trial court baldly rejected the careful deliberations of individual trial judges and has ordered uninformed, arbitrary, and unlawful reductions in the time inmates must remain incarcerated. Such reductions constitute serious modifications of the considered sentences originally imposed. Therefore, since it was not the criminal trial court in any of the individual cases involved here, the court below had absolutely no authority to order sentence modifications. *See Banks v. Cain,* 345 Pa. 581, 587, 28 A.2d 897 (1942) (parole, while not a commutation of sentence, is a serious modification of sentence where it shortens imprisonment time).

The seriousness of the lower court's violation of the statutory sentencing scheme is further illustrated when one considers the fact that the legislature gave even sentencing judges only restricted powers to modify sentences. Specifically, 42 Pa.C.S.A. § 4404 (Purdon's 1982) states that courts may modify or rescind orders within 30 days of their entry and if no appeal has been taken or allowed. In fact, courts have specifically ruled the trial judges have no jurisdiction to alter sentences after 30 days. *Commonwealth vs. Lynch,* 304 Pa. Super. 248, 450 A.2d 664, 666 (1982). *See also, Commonwealth v. Canady,* 297 Pa. Super. 292, 443 A.2d 843, 845 (1982) (interpreting 42 Pa.C.S.A. § 5505 as requiring sentence modification within 30 days

if at all).[9] If the legislature precluded the sentencing judge from modifying sentences after 30 days, it is unimaginable that the lower court had any legitimate or lawful authority to order such untimely sentence modifications.

Last, the legislature imposed an additional limitation on sentence modification that the trial court completely ignored. Specifically, 42 Pa.C.S.A. § 5505 requires notice and an opportunity to be heard for all parties of interest before any court may modify a sentence. *See Commw. v. Colding,* 418 Pa. 112, 114, 393 A.2d 404 (1978); *Commw. v. Yoder,* 249 Pa. Super. 389, 392, 378 A.2d 350 (1977); *Commw. v. Horsman,* 239 Pa. Super. 534, 361 A.2d 433 (1976). By failing to provide any guidence, criteria, or mechanism by which the City should implement the June 22nd Order, the lower Court completely abandoned its responsibility to provide such notice and opportunity to be heard to the District Attorney's office or to any inmates affected by the order.

In acting as it has, the lower court abused its discretion to fashion remedies in this litigation and acted contrary to the laws of this Commonwealth. For the reason set forth above, the City must prevail in this appeal.

B. The Lower Court Also Had No Power To Order The Parole Of Sentenced Inmates In Contravention of Statutory Parole Procedures.

If this Court does not perceive the June 22, 1984 order as modifying sentences, then, to the extent that it requires release, the order must be characterized as paroling sentenced inmates. Such a parole requirement by this trial court constitutes a blatant abuse of the lower court's power to form remedies in this litigation since it has absolutely no power to parole inmates.

Pursuant to its exclusive power to create a penal system, the Pennsylvania legislature enacted a system of administration for the parole of inmates. The legislature titled the statute, "An act to create a *uniform and exclusive* system for the administration of parole in this Commonwealth. . . ." 1941, Aug. 6, P.L. 861, Title 61 sec. 331.1, 61 P.S. § 331, *et seq.* (emphasis added). Not surprisingly, the intent of the Act is "to create a *uniform and exclusive* system for the administration of parole in this Commonwealth." *Id.* The Act creates a Board of Probation and Parole (hereinafter the Board) and vests the Board with exclusive power to grant parole in all cases involving maximum sentences of two years or more. 61 P.S. § 331.17 (Purdon's 1964). The statute vests exclusive power of parole over persons sentenced less than two years in the sentencing court alone. *Id.* The statute makes absolutely no provision for a court such as this lower court to parole inmates. "Parole is not an inherently judicial power; it is granted by the legislature on its own terms and the legislature can give the power in whole or in part to any other government agency." *Banks v. Cain,* 345 Pa. 581, 586-7, 28 A.2d 897 (1942). In its wisdom, the legislature gave exclusive parole power to the Parole Board and to trial courts.

To the extent that it requires parole of sentenced inmates, the June 22, 1984 order also constitutes an unlawful abuse of discretion because it requires the automatic parole of persons based on no particular criteria whatsoever. The lawful statutory parole mechanism, on the other hand, requires *individual, informed, and considered* determinations of whether or not parole serves the best interests of the inmates and the Commonwealth. 69 P.S. § 331.21 (Pur-

don's 1964) (emphasis added). The public policy of Pennsylvania is to use parole only as a disciplinary and corrective measure. 61 P.S. § 331.1 (Purdon's 1964). The June 22, 1984 order plainly ignores and violates these policies. Since it neither considers the inmate's bests interests nor the public's best interests, it is neither a disciplinary nor a corrective influence on the inmates who will be released.

Last, the arbitrary release of prisoners required by the June 22, 1984 order violates the underlying purposes of parole: to provide appropriate individualized treatment in order to promote the rehabilitation of criminal offenders and to assist them in their restoration to normal life in the community. *Banks v. Cain,* 345 Pa. 581, 591, 28 A.2d 897 (1942). Thus, the automatic release that must result if the lower court's order is to be met ignores the underlying policies and laws enacted by the legislature. Therefore, this Court must reverse the June 22, 1984 order.

C. The Lower Court Also Lacked The Power To Modify The Valid Orders Incarcerating Pretrial Detainees.

Approximately 2,800 inmates of the Philadelphia prisons, or 75% of the population, are held in pretrial status. Most are held with bail; some are held with no bail. A large percentage of the bail population also are being held for other detainers. Therefore, in reality, if the City must meet the population caps ordered, it will be forced to release pretrial detainees as well as convicted inmates.

Just as the lower court had no power to direct the release of convicted inmates, the court also had no authority to revoke or supercede the valid orders incarcerating pre-

trial detainees other than through the approved bail review process described in Section I. As described there, this process necessarily requires proper notice to and full participation by the District Attorney's Office and the Court's pre-trial unit on an individual, case-by-case basis. Unfortunately, this process will not enable the City to meet the population caps ordered by the trial court. To do so the City would have to release pretrial detainees on a wholesale basis, and such a release is unlawful.

Each inmate held while awaiting trial has already received a bail hearing before a competent judicial authority. In ordering incarceration, the appropriate authority heard arguments by counsel who were intimately acquainted with the specific facts, charges, backgrounds, records, and personalities in each case. Armed with these facts, the issuing authorities applied the detailed and specific criteria established by the Pennsylvania Supreme Court in Pennsylvania Rules of Criminal Procedure 4003 and 4004. Based upon its thorough knowledge of the details in each case, the issuing authority decided that the dangers of releasing these prisoners without substantial security to ensure lawful behavior outweighed any potential detriment resulting from incarceration. Certainly, the judges who ordered incarceration knew of the overcrowded prison conditions, but they ordered imprisonment anyway. It is not rational to think that the lower court here, in its relative vacuum of information, could better assess the relative merits of incarceration for these individuals.

More importantly, to the extent that the June 22, 1984 order requires the automatic release of pretrial detainees, it acts as an unlawful modification or rescission of the terms of the original bail and incarceration order. Under

the relevant Pennsylvania Rules of Criminal Procedure, Rule 4005, the lower court cannot modify the bail orders of other courts. That rule specifies grounds, procedures, and appropriate standards under which appropriate authorities may modify bail in various circumstances. No reasonable interpretation of Rule 4005 would allow implementation of the lower court order, which ignores the authority of other courts and acts as a bail modification mechanism.

Just as the lower court has no lawful power to reject and supercede the valid incarceration orders of other courts by issuing an order that forces the City to release inmates, the City has no lawful power to violate these valid orders by implementing such a release. The City holds or releases prisoners only by virtue of court orders. Since the June 22, 1984 order provides no mechanism for, and ignores the statutory requirement of, obtaining release approval from judges who originally ordered incarceration. the order offers the City the inevitable choice of violating either the individual incarceration orders or the June 22nd order. If allowed to stand, the lower court's order will also force the City to ignore all incarceration orders issued after the June 22nd order takes effect.

Therefore, the lower court's order unlawfully places the City in an intolerable position between mutually exclusive court orders. For this and all other foregoing reasons, this Court must reverse the June 22, 1984 order.

FOOTNOTES ACCOMPANYING ARGUMENT III OF BRIEF

[8] Of course, in the event that the judge cannot impose sentence, or if the judge's continued participation becomes impossible, then another judge may impose sentence. *Commw. v. Thompson,* 328 Pa. 27, 31, 195 A. 115 (1937).

[9] The strict limitations on trial courts' powers to modify sentences are long-standing in Pennsylvania. In fact, the same limitations imposed under 42 Pa.C.S.A. § 5505 (Purdons 1982) also existed under its predecessor, 12 P.S. § 1032 (repealed). *See Commw. v. Yoder,* 249 Pa. Super. 389, 391, 378 A.2d 350, 351 (1977) (trial judge may modify sentences only during the same term or within 30 days, whichever is longer); *Tillman v. Pa. Board of Probation & Parole,* 48 Pa. Cmwlth. 325, 409 A.2d 949 (1980) (trial judge resentencing more than one year after imposition of original sentence had no authority to do so). Two cases which seem to hold differently are easily distinguishable. In *Great Am. Credit Corp. v. Thomas Mini-Markets, Inc.,* 230 Pa. Super. 210, 326 A.2d 517 (1974), the court sanctioned a general equity power to re-open judgments. In that case, however, the re-opening involved a civil judgment and was based on a court mistake. The court granted judgment believing the case to be uncontested when, in fact, a letter requesting an extension of time to file papers was lost in court processing. *Id.* at 212-13. In *Comm. v. Hawk,* 328 Pa. 417, 196 A.5 (1938), the court re-opened a sentence based on a specific abuse of discretion by the sentencing court.

DIRECTLY PERTINENT STATUTES AND RULES

Federal Rule of Civil Procedure 24(a) and (b)

> *(a) Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> *(b) Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Pa. Stat. Ann. tit. 16, § 1402(a)

> § *1402. Duties of district attorney; entry of nolle prosequi*
>
> (a) The district attorney shall sign all bills of indictment and conduct in court all criminal and other prosecutions, in the name of the Commonwealth, or, when the Commonwealth is a party, which arise in the county for which he is elected, and perform all the duties which, prior to May 3, 1850, were performed by deputy attorneys general. The duties herein conferred shall be in addition to all other duties given to the said district attorney by other statutes.

Pa. R. Crim. P., Rule 4004, 42 Pa. C.S.A.

Rule 4004. Standards for Setting Bail

In setting pre-verdict bail, bail shall be such as to insure the presence of the defendant as required by the bond and shall be determined according to the following standards:

(i) the nature of the offense charged and any mitigating or aggravating factor that may bear upon the likelihood of conviction and possible penalty;

(ii) the defendant's employment status and history and his financial condition;

(iii) the nature of his family relationships;

(iv) his past and present residences;

(v) his age, character, reputation, mental condition, record of relevant convictions, and whether addicted to alcohol or drugs;

(vi) if he has previously been released on bail, whether he appeared as required; and

(vii) any other facts relevant to whether the defendant has strong ties with the community or is likely to flee the jurisdiction.

Pa. Stat. Ann., tit. 61, § 314 (1964)

§ *314. Parole from county jails, houses of correction, or workhouses; procedure; violation of parole; re-parole*

The courts of quarter sessions and the courts of oyer and terminer of the several judicial districts of the Commonwealth, and other courts of record having jurisdiction, are authorized, after due hearing, to release on parole any convict confined in the county jail, house of correction, or workhouse of their respective district. No convict shall be paroled, under the provisions of this act, except upon petition verified by the oath of the person convicted or by some one in his

or her behalf, and presented and filed in the court in which such person was convicted. Upon the presentation of any such petition, the court shall fix a day for hearing. A copy of said petition shall also be served upon the district attorney and upon the prosecutor in the case, if he is resident within the county, at least ten days before the day fixed for said hearing. Proof of service upon the district attorney and the prosecutor shall be produced at the hearing. After such hearing, the court shall make such order as to it may seem just and proper. In case the court shall parole such convict, it shall place him or her in charge of and under the supervision of a designated probation officer. Any of said courts shall have power to recommit to jail, workhouse, or house of correction on cause shown by such probation officer that such convict has violated his or her parole, and to reparole in the same manner and by the same procedure as in the case of the original parole if, in the judgment of said court, there is a reasonable probability that the convict will be benefited by again according liberty to such convict, and also to again recommit for violation of such parole. This power of parole shall extend for a period not to exceed the maximum sentence provided by law for the offense of which the convict was convicted, regardless of the sentence first imposed upon the prisoner: Provided, however, That any of said courts may release on parole, upon petition to any of said courts, any person who has been committed to any jail, workhouse, or house of correction by any magistrate, alderman, or justice of the peace. Said courts shall have the same power to recommit such persons paroled as herein set forth. 1911, June 19, P.L. 1059, § 1; 1921, May 5, P.L. 379, § 1; 1923, May 11, P.L. 204, § 1.

Pa. Stat. Ann., tit. 61, § 331.26

§ 331.26 Parole from imprisonment for less than 2 years; supervision by board

Paroles from imprisonment for less than a maximum of two years shall be granted by the sentencing

court and shall, together with all probations except probation as tc which supervision is specially ordered by the court as provided for in section twenty-five of this act,[1] be without supervision by the board. 1941, Aug. 6, P.L. 861, § 26; 1943, May 27, P.L. 767, § 12.

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No. 87-447

In the Supreme Court of the United States

OCTOBER TERM, 1987

MARTIN HARRIS, *et al.*,
Plaintiffs-Respondents

v.

IRENE PERNSLEY, *et al.*
Defendants-Respondents

RONALD D. CASTILLE,
Proposed Intervenor-Petitioner

Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals Rule Correctly that the Philadelphia District Attorney Had No Sufficiently Direct or Substantial Interest in this Prison Overcrowding Litigation to Permit Intervention As of Right?

2. Is the Decision of the Court of Appeals to Apply an Abuse of Discretion Standard of Review When Assessing a Denial of Intervention Sufficiently Important to Warrant a Grant of Certiorari by This Court?

3. Based on Its Affirmance of the Denial of the District Attorney's Motion to Intervene, Did the Court of Appeals Properly Dismiss the District Attorney's Appeal of the Merits of the Consent Decree Approved by the District Court?

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No. 87-447

In the Supreme Court of the United States

OCTOBER TERM, 1987

MUNICIPAL RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This class action was brought on behalf of all past, present, and future inmates against City and State officials alleging unconstitutional overcrowding in part of the Philadelphia Prison System. On April 30, 1982, the plaintiff-respondents (hereinafter "plaintiffs") filed a *pro se* complaint. The district court appointed counsel to represent the plaintiff class on November 12, 1982. Counsel then filed an amended complaint on April 19, 1983. All defendants moved to dismiss the plaintiffs' amended complaint, and on January 3, 1984, the district court granted the motion to dismiss.

On January 20, 1984, the plaintiffs appealed the district court's dismissal to the United States Court of Appeals for the Third Circuit. On February 22, 1985, the Third Circuit reversed the district court's decision, *Harris v. Pernsley*, 755 F.2d 338 (3d Cir. 1985), and denied rehearing *in banc* on March 28, 1985. *Harris v. Pernsley*, 758 F.2d 83 (3d Cir. 1985). On June 17, 1985, the municipal respondents (hereinafter "City defendants") filed a Petition for Writ of Certiorari in this Court, which was denied on November 4, 1985. *Harris v. Pernsley*, 474 U.S. 965 (1985).

On December 23, 1985, the district court began conducting pretrial conferences to expedite resolution of this case. On January 27, 1986, the plaintiffs filed a second amended complaint, alleging the unconstitutionality of conditions in the entire Philadelphia Prison System due to overcrowding.

Philadelphia prisons are overcrowded. After working with the plaintiffs and the state criminal courts over a six-month period, the City defendants agreed to a settlement in this litigation that would have alleviated that overcrowding and avoided the release of any inmates. Instead of relying on prison population caps, the consent decree proposed by the parties ("Proposed Consent Decree I") contained provisions for a priority court listing system in the state criminal courts, ensuring that the criminal hearings of all future inmates would be held in a timely manner. No person would be released if the hearings or trials were held within the prescribed time frames. Even if releases occurred, criminal prosecution would remain unaffected; it would simply proceed as if the inmate had made bail. Proposed Consent Decree I also mandated early parole for individuals sentenced to a minimum of less than one year in the Philadelphia Prison System, provided the individuals did not present a danger to themselves or others. In essence, Proposed Consent Decree I attempted to meet both the concerns of the local criminal justice system and the desire of the City defendants to provide a constitutional penal environment. It did not rely on population caps to do so.

The plaintiffs and the City defendants submitted Proposed Consent Decree I to the district court on August 15, 1986. On August 18, 1986, the District Attorney of Philadelphia, petitioner here, filed his Motion to Intervene, which was opposed by the plaintiffs and the City defendants. Before the district court held an evidentiary hearing on the motion, the City defendants met with representatives from the District Attorney's office and the administration of the state criminal court system. The City defendants were informed that the Philadelphia criminal justice system opposed Proposed Consent Decree I as being too intrusive into the operations of the state courts and were requested to negotiate with the plaintiffs to obtain a settlement that included population caps for the Philadelphia Prison System. In addition, the City defendants were told to leave implementation of the population caps to the state courts.

Following this request, the City defendants and the plaintiffs negotiated and agreed to Proposed Consent Decree

II, which was forwarded to the district court on October 3, 1986. Although not opposed to population caps in principle, the District Attorney disagreed with the actual figures contained in Proposed Consent Decree II; he contended that the proper prison population maximum should be 4400, approximately 200 more inmates than were being housed in the Philadelphia Prison System at the time.

The district court held hearings on the District Attorney's Motion to Intervene on October 10, 1986, October 27, 1986, November 14, 1986, and December 11, 1986. The District Attorney's alleged basis for intervention was his duty to protect the public safety and to prosecute criminal matters. He argued that these interests were sufficient for the district court to grant him intervention as of right, or in the alternative, permissive intervention.

On December 31, 1986, the district court denied the District Attorney's Motion to Intervene as a party defendant. The court concluded that the District Attorney did not have a sufficient interest in the litigation, that the petition was not timely filed, and that the City defendants had adequately represented any interests that the District Attorney might have in the litigation. On the same day, the district court approved Proposed Consent Decree II, having heard argument on October 10, 1986, November 14, 1986, and December 11, 1986. The court found the consent decree to be a fair and equitable settlement of the matter.

On January 8, 1987, the District Attorney appealed the orders denying his Motion to Intervene and approving the consent decree to the Court of Appeals for the Third Circuit.[1] On May 15, 1987, the Court of Appeals for the Third Circuit affirmed the district court's denial of the District Attorney's Motion to Intervene and dismissed the District Attorney's appeal from the approval of the Settlement Agreement. On May 29, 1987, the District Attorney filed a Petition for Panel Rehearing and Rehearing In Banc; on June 15, 1987, the court denied rehearing. The court issued the certified judgment, in lieu of a formal mandate, on June 23, 1987.

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1. City defendants rely on the District Attorney's Statement of the Case concerning the procedural history of his applications for stays.

The District Attorney has now petitioned this Court for a writ of certiorari, arguing that enforcement of the consent order requires the wholesale release of prisoners. On the contrary, the district court never ordered, required, or recommended releases. Instead, the district court ordered maximum allowable population levels, to be implemented over a preplanned and scheduled period of time. *See* Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter "App.") 74 at ¶ 2(f), (g). (The population levels and timetable were amended by the district court's order of July 14, 1987. *See* Appendix attached hereto at A-1.) If the City defendants fail to meet the prescribed population levels, the order directs that they will seek individual state court reviews of persons either being held on the lowest bail pending trial or with less than 60 days remaining to serve on their county sentences (that is, sentences of less than 2 years). Furthermore, the order clearly states that the City defendants shall not even seek court review of any person charged with, or convicted of, murder or forcible rape, or any person whose release would constitute an imminent threat to public safety or to the inmate's own health, safety, or welfare. *See* App. 75 at ¶ 4. Only after such processes are completed and the population levels still exceed the maximum allowable levels are the City defendants prohibited from accepting additional admissions, with the exception of persons charged with, or convicted of, murder, forcible rape, or a crime involving the use of a gun or knife in the commission of an aggravated assault or robbery, until the maximum allowable population is met. *See* App. 76 at ¶ 5.

The individual state court reviews will occur through an established procedure that has operated since 1981 and has been upheld by the Pennsylvania courts. *See, e.g., Jackson v. Hendrick*, 498 Pa. 270, 446 A.2d 226 (1982). In this process, the District Attorney is given notice of each inmate being considered for bail reduction or release on early parole. An individual hearing is conducted by a judicial officer, and the District Attorney has the full opportunity to appear and to object. Thereafter, he retains the right to appeal any adverse decision. Thus, the district court never ordered wholesale prisoner releases but instead adopted an already-existing, law-

ful process to achieve acceptable prison population levels. Individual decisions regarding releases are made by officers of the state criminal court system, with full participation by the District Attorney at each hearing.

Since October 1986, the prison population has decreased from approximately 4300 to approximately 4000 inmates as of this filing. In the summer months of 1987, the prison population consistently remained below 4000. This decrease was accomplished by a variety of methods, none of which entailed wholesale prisoner releases or any undue threat to public safety. Instead, besides completing construction of a new prison facility, proceeding with construction plans for another holding facility, and continuing to increase the operating and capital budgets for the prisons, the City defendants undertook preliminary planning with state criminal court administrators to institute systemic changes to avoid any wholesale release of prisoners in the future. For example, on January 14, 1987, Chief Justice Robert N.C. Nix, Jr., of the Pennsylvania Supreme Court, directed that persons in detention should receive priority state court listings to expedite disposition of their cases. This directive was implemented by the state court system. Also, the local court administrators instituted a process of scheduling the 250 oldest detention cases (persons held in pretrial status in the Philadelphia prisons) for trial during the summer of 1987. In addition, by working with the state criminal courts, the City defendants significantly decreased the number of state prisoners who were being lawfully held in the Philadelphia Prison System. Last, the state criminal courts agreed to increase the frequency of the bail review hearings and the number of cases heard at each listing.

Notwithstanding these efforts, the population of the Philadelphia Prison System began to exceed the court-ordered maximums in late August 1987. Thus, on September 22, 1987, the City defendants filed a Motion to Enlarge Time in the district court. Following negotiations between the City defendants and the plaintiffs, the parties submitted a Stipulation regarding implementation of the terms of the consent order. On September 25, 1987, the district court entered an order approving the Stipulation, on the condition that the City

defendants continue to work with the state court administration to develop a plan for the permanent amelioration of overcrowding. *See* Appendix attached hereto at A-4.

Consistent with the plan to develop a permanent solution to the overcrowding problem, the City defendants intend to concentrate both on decreasing the number of pretrial inmates detained with the lowest bail and on shortening the length of time all detainees remain incarcerated. As of October 1, 1987, approximately 280 persons were detained on $2500 bail or less and without any other court detainers. (In Philadelphia, persons are permitted to post ten percent of their bail in order to be free from incarceration pending trial. This means that these persons would be free pending trial if they could produce $250 or less.) By decreasing, through the bail review process, the number of such persons being detained for long periods of time, the City defendants hope to decrease the prison population without any wholesale release of inmates, without any undue risk to the general public, and without denying the District Attorney his role in the accepted bail review process.[2]

ARGUMENT

An examination of the opinion of the Court of Appeals for the Third Circuit reveals three issues properly available for review by this Court at this time: the affirmance of the district court's denial of intervention as of right; the adoption of an abuse of discretion standard of review in intervention cases; and the dismissal of the non-party's appeal of the merits of the consent decree. Ultimately, none of these issues is sufficiently meritorious to warrant the Court's granting of certiorari.

I. The Court of Appeals Properly Affirmed the District Court's Denial of Intervention.

Central to the holding of the Court of Appeals for the

2. Since filing his petition for certiorari, the District Attorney reapplied to this Court for a stay of the district court's consent order. After being instructed to seek relief in the court of appeals, he filed a second Motion to Recall and Stay Issuance of Mandate and Execution and Enforcement of the Judgment Pending Petition for Certiorari on September 29, 1987. The Court of Appeals for the Third Circuit denied that motion on October 5, 1987.

Third Circuit in this matter was its decision to affirm the district court's denial of intervention as of right. The court based that ruling on its determination that the District Attorney had an insufficient interest in the litigation to require his intervention. *Harris v. Pernsley*, No. 87-1025, slip op. at App. 125 (3d Cir. May 15, 1987).[3] The District Attorney seeks this Court's review of the appellate court's decision by arguing that the court sanctioned an "unwarranted intrusion into a state court criminal justice system." *See* Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit (hereinafter "Petition for Certiorari") at 19. By focusing on the terms of the consent decree rather than on the nature of the underlying litigation, the District Attorney has attempted to misdirect the attention of this Court to the merits of the consent decree, an issue not addressed by the court of appeals. In fact, the only issue that court decided and, therefore, the only issue properly before this Court, is whether the district court correctly denied intervention.[4] A

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3. Although the opinion of the court of appeals is reported at 820 F.2d 592 (3d Cir. 1987), for ease of reference, the City defendants will cite to the opinion as reproduced in the Appendix to the Petition for Writ of Certiorari.

4. Because the court of appeals decided that the district court correctly held that the District Attorney had an insufficient interest to entitle him to intervene, it did not review the district court's conclusions concerning the other elements required by Fed. R. Civ. P. 24(a). To be entitled to intervene as of right, a putative intervenor must by timely application demonstrate a direct, legally cognizable interest in the litigation that will be affected by the disposition, and must also demonstrate inadequate representation of that interest by existing parties. *See, e.g., Pennsylvania v. Rizzo*, 530 F.2d 501, 504 (3d Cir.), *cert. denied sub nom. Fire Officers Union v. Pennsylvania*, 426 U.S. 921 (1976).

In addition to ruling that the District Attorney had not established a sufficient interest in this lawsuit, the district court concluded that he failed to meet the other requirements imposed by Rule 24(a). Specifically, the court reasoned that the application for intervention was untimely, since the District Attorney knew or should have known, at least since this Court denied the City defendants' petition for certiorari on November 4, 1985, that settlement negotiations were likely. According to the district court, the District Attorney offered no adequate explanation for his failure to move to intervene then, rather than waiting until the eve of settlement, thereby greatly prejudicing the existing parties. *Harris v. Pernsley*, No. 82-1847, slip op. at App. 57-58 (E.D. Pa. Dec. 31, 1986). In addition, the district court

review of the Third Circuit's opinion confirms the soundness of the court's reasoning and counsels against a grant of certiorari.

In affirming the district court, the court of appeals correctly relied on this Court's decision in *Donaldson v. United States*, 400 U.S. 517 (1971), and ruled that to obtain intervention as of right pursuant to Federal Rule of Civil Procedure 24(a), the District Attorney must demonstrate a direct, significant, and legally protectable interest in the proceedings. He must also show that resolution of the lawsuit will directly affect that identified interest. Absent such an interest, and a showing of some direct effect, a court must deny intervention. *See Harris v. Pernsley* at App. 110-11, 122-23.

To determine whether any cognizable interest exists in a given case, a court must look to the purposes of the lawsuit.[5] *See, e.g., Alston v. Coughlin*, 109 F.R.D. 609, 613 (S.D.N.Y. 1986); *Dodson v. Salvitti*, 77 F.R.D. 674, 676 (E.D. Pa. 1977) (intervention denied in public housing litigation when purpose of complaint is to vindicate constitutional and statutory rights while intervenors' interest is in protecting property values); *East Powelton Concerned Residents v. United States Department of Housing & Urban Development*, 69 F.R.D. 392, 394 (E.D. Pa. 1975) (intervention denied in public housing litigation when purpose of complaint is to vindicate constitu-

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concluded that any purported interest of the District Attorney was adequately represented by the City defendants, as demonstrated especially by their willingness to renegotiate Proposed Consent Decree I after learning of the District Attorney's objections to that proposal. *Id.* at App. 62-63. (References to the district court opinion are to the Appendix to the Petition for Writ of Certiorari. The opinion is reported at 113 F.R.D. 615 (E.D. Pa. 1986)).

5. The Third Circuit correctly reasoned that although "the scope of [the District Attorney's] interest is defined by the scope of his legal duties under Pennsylvania law[,]" whether those duties are sufficient to accord a right to intervene is a matter of federal law. *Harris v. Pernsley* at App. 113 & n.7. *See also New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 466 n.29 (5th Cir.) (even in diversity case, in which federal court looks to substantive state law, federal law governs requirements for intervention, including the character of interest necessary for intervention), *cert. denied sub nom. Morial v. United Gas Pipeline Co.*, 469 U.S. 1019 (1984).

tional and statutory rights while intervenors' interest lies in halting demolition of certain houses).

The court of appeals recognized these general guidelines and was also mindful that intervention disputes should be resolved in a pragmatic manner. *See Harris v. Pernsley* at App. 110-11. To that end, the court analyzed both the terms of the consent decree and the duties of the District Attorney, to determine whether those duties were sufficient to create an interest entitling the District Attorney to intervene in this prison conditions lawsuit. The Third Circuit carefully considered the interests proffered by the District Attorney but rejected them as not comprising the type of direct interest necessary to require intervention, either to oppose the plaintiffs' claims of unconstitutionality or, more important, to participate in formulating a remedy. *See id.* at App. 115-25. Specifically, the court of appeals ruled that the consent decree neither expressly nor implicitly impinged, in more than an incidental manner, on any of the interests identified by the District Attorney as requiring his intervention in this lawsuit. *See id.* at App. 120-25. In other words, the Third Circuit recognized, and gave due consideration to, the District Attorney's legitimate role in state court criminal proceedings and decided that that role is simply not at issue in this civil prison overcrowding litigation.[6] Here, the plaintiffs alleged uncon-

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6. Throughout this litigation, the District Attorney has refashioned his purported interest and now characterizes it as a general interest in all proceedings that result in prisoner releases. *See* Petition for Certiorari at 13. (*Compare Harris v. Pernsley* at App. 113, 116, relating District Attorney's assertion of interest as his duties as a public official charged with the enforcement of Pennsylvania's criminal laws.) In support of his claim, the District Attorney cites various statutes and state court opinions that define the duties of his office. Petition for Certiorari at 14-17 & nn.10 & 12 (citing *Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829 (1972) (Commonwealth has burden of proof at bail hearings); *Commonwealth ex rel. Specter v. Bauer*, 437 Pa. 37, 261 A.2d 573 (1970) (District Attorney has authority to represent Commonwealth in criminal law enforcement proceedings); *Commonwealth v. Heiser*, 330 Pa. Super. 70, 478 A.2d 1355 (1984) (Commonwealth has burden of proof at bail hearings); *In re Miller*, 209 Pa. Super. 47, 224 A.2d 89 (1966) (Commonwealth has standing to appeal discharge of juvenile from state correctional institution); Pa. Stat. Ann. tit. 61, § 314

stitutionally overcrowded conditions within the Philadelphia Prison System. They neither complained of nor sought any changes in the way the District Attorney prosecutes criminal cases. The sole purpose of their complaint was to remedy the allegedly inadequate conditions of confinement in Philadelphia prisons.

As the Third Circuit noted, state law vests responsibility for those prison conditions in the executive branch of Philadelphia government. *Id.* at App. 116, 119. Specifically, the Philadelphia Home Rule Charter gives the Board of Trustees of the Philadelphia Prisons the direct authority to run the prisons, 351 PA. CODE § 5.5-701, and grants to the Mayor of Philadelphia the authority to allocate City monies, *id.* §§ 4.4-100, 4.4-101, and to determine the inmate capacity of the City prisons. *Id.* § 5.5-700(c). The District Attorney shares no responsibility whatsoever for the operation or maintenance of the Philadelphia Prison System. Since the complaint in this matter relates only to the operation and maintenance of that system, the District Attorney has no cognizable interest in this case. *See Graddick v. Newman*, 453 U.S. 928, 934 (1981) (Powell, J., in chambers) (when responsibility for operating prisons is vested in executive officer, unrelated government official is not proper party to litigate prison conditions).[7] *But see* 453 U.S. 928, 937 (1981) (Rehnquist, J., now C.J., in chambers).

Nonetheless, the District Attorney insists that this Court

(Purdon 1964) (sentencing judge has complete authority to parole inmates sentenced to terms of less than two years, after hearing and notice to all parties)). Significantly, the District Attorney fails to note the repeal by the Pennsylvania legislature of the single statutory provision that might have provided direct support for his alleged interest. Pa. Stat. Ann. tit. 16, § 1402(b) (Purdon 1964) (repealed) (specifically identifying role of prosecutor in prisoner discharges). He also neglects to note that the prosecutor is by statute granted a voice in decisions to place inmates in early release programs only when the inmate has not served the minimum sentence, and then only when the sentencing judge objects, and not otherwise. *See* Pa. Stat. Ann. tit. 61, § 1052 (Purdon Supp. 1987). Thus, Pennsylvania law does not unequivocally require the prosecutor's participation in all release decisions, as he asserts.

7. Although Justice Powell did not necessarily speak for the Court in *Graddick*, the full Court did affirm his earlier denial of a stay.

should review the Third Circuit's decision because the consent decree "effectively vitiates" his ability to defend and preserve "the integrity of incarceration orders he has obtained." *See* Petition for Certiorari at 14.[8] As the appellate court aptly noted, the District Attorney, in so defining his duties, has appropriated for himself a much larger role in the state criminal justice system than contemplated by any state caselaw, statutory, or regulatory authority. *See Harris v. Pernsley* at App. 123-24. Although the District Attorney would

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8. Under the guise of attempting to establish that he has a legitimate interest in this prison conditions lawsuit, the District Attorney consumes much of his argument with his effort to demonstrate the illegality of the consent decree itself. In the process, he completely misconstrues the terms of the decree and distorts the bail review procedure established by the decree. For example, the District Attorney insists that the consent decree calls for sentence modifications, inconsistent with state law. *See* Petition for Certiorari at 16-17. In fact, the consent decree establishes a procedure whereby the City defendants may seek court review of early parole requests, not sentence modification. Therefore, Pa. R. Crim. P. 1410 and Pa. R.A.P. 1763 are not at all implicated, much less violated, by the consent decree. Moreover, the requests for early parole are addressed to the sentencing court, and are therefore completely consistent with the procedure established by state statute. *See* Pa. Stat. Ann. tit. 61, §§ 314, 331.26 (Purdon 1964 & Supp. 1987).

Likewise, contrary to the District Attorney's assertions, nothing in the consent decree undercuts the bail guidelines established in the Pennsylvania rules of criminal procedure. The District Attorney apparently would like to convince this Court that the consent decree empowers the City defendants to release inmates at will. In fact, the consent decree requires that the City defendants *seek the release* of specified inmates in a proceeding before a judicial officer. In deciding whether or not to release a particular inmate, that officer of the court necessarily takes into account the bail guidelines established by procedural rule.

Finally, throughout his argument the District Attorney insists that he has no role in any of the proceedings adopted in the consent decree. This is absolutely untrue. In both the bail review and early parole hearings, the District Attorney has the opportunity to participate, object to release, and appeal any decision he deems to be adverse to his interest. At most, his job at those hearings might be made more difficult, in the face of a judicial officer's serious consideration of whether an inmate's continued detention is necessary. The District Attorney cannot seriously maintain that he is thereby prevented from fulfilling his duties under state law. As did the court of appeals, this Court should reject any such contention. This consent decree simply does not contravene state law.

apparently have this Court believe that he alone can uphold validly imposed bail and incarceration orders, he frankly claims an interest that is not his to assert. In fact, to the extent that maintaining the integrity of such orders is an interest implicated in this litigation, that interest belongs to the state courts themselves, not to the District Attorney. As did the court of appeals, this Court should reject the District Attorney's presumptuous assumption that "he has the right to oversee the entire criminal justice system in Philadelphia." *Id.* at App. 124.

Rather than accept the District Attorney's expansive construction of his interest, the Third Circuit properly delineated that interest as "the power and duty to advocate bail levels, to prosecute defendants, to recommend sentences once defendants are convicted, to defend convictions on appeal, and to defend challenges to the Commonwealth's penal statutes." *Id.* at App. 120. The District Attorney has failed to demonstrate how this litigation could have a cognizably direct and significant impact on that interest, as Federal Rule of Civil Procedure 24 requires. *See Donaldson v. United States*, 400 U.S. 517, 531 (1971). In the appellate court, the District Attorney attempted to establish an interest in the lawsuit by claiming that the parties' settlement might affect his ability to prosecute some cases. Specifically, he speculated that if releases become necessary to meet population caps, some released persons might fail to appear for court and thereby delay prosecution, and that an admissions moratorium would render his role as prosecutor meaningless. *See Harris v. Pernsley* at App. 121-22. The court of appeals correctly concluded that even assuming that such an effect might occur, it neither creates the direct, cognizable interest nor establishes the substantial impact on that interest that Federal Rule of Civil Procedure 24 requires. *Id.* at App. 125.

In assessing claims of indirect and speculative effects such as those identified by the District Attorney here, federal courts have consistently rejected intervention. This Court's reasoning in *Donaldson v. United States*, 400 U.S. 517 (1971), is especially enlightening. In *Donaldson*, a taxpayer sought intervention in a proceeding brought by the Internal Revenue Service to enforce a subpoena against the taxpayer's employer.

The subpoena demanded records containing financial information relating directly to the taxpayer. The Court denied intervention as of right, reasoning that despite the existence of an interest that "looms large in his eyes," *id.* at 530-31, the taxpayer had no sufficiently direct interest in the subpoena enforcement proceedings to satisfy the requirements of Rule 24(a). *Id.* at 531.

Similar reasoning governed the decisions in *Alston v. Coughlin*, 109 F.R.D. 609, 613 (S.D.N.Y. 1986) (intervention by prison guards rejected in prison conditions litigation, even though settlement affected work assignment practices for guards, since effect, although real, was at best indirect and speculative); *Clover Farms Dairy v. Brumbaugh*, 102 F.R.D. 118, 120 (M.D. Pa. 1984) (in suit between dairy industry and regulatory agency, interest of milk consumers in possible milk price changes exists but is too speculative and indirect for intervention analysis); *Dodson v. Salvitti*, 77 F.R.D. 674, 676 (E.D. Pa. 1977) (intervention denied even though contemplated effect may occur, since complaint did not directly call intervenors' asserted interest into issue); and *East Powelton Concerned Residents v. United States Department of Housing & Urban Development*, 69 F.R.D. 392, 394 (E.D. Pa. 1975) (although court decision may produce effect described, intervention denied because intervenor identified interest not contemplated by complaint). Thus, ample precedent supports the decision of the court of appeals to affirm the district court's conclusion that any effect this consent decree might have on the District Attorney is insufficiently direct, substantial, or protectable for Rule 24 purposes.

Significantly, the District Attorney asserted the same interest identified here in prior litigation and failed.[9] Most di-

9. It is also important to note that the City defendants previously raised issues to this Court, in this litigation, that are fundamentally similar to those raised by the District Attorney now. Specifically, in a 1984 petition for writ of certiorari in this matter, the City defendants objected to the prospect of undue federal court interference in the operation of the Philadelphia prisons. Now, in a slightly different context, the District Attorney raises, in essence, similar objections to what he perceives as judicial overreaching. Two years ago, this Court declined to consider the issue. *Harris v. Pernsley*, 474 U.S. 965 (1985). Having decided then that no issue was worthy of consideration in this case, the Court should likewise decline this petition.

rectly on point, the prosecutor moved to intervene in *Jackson v. Hendrick*, a state court civil rights lawsuit challenging the conditions in the Philadelphia prisons, when the state trial court instituted the same bail review process at issue here, to control overcrowding in the Philadelphia prisons. *Jackson v. Hendrick*, 498 Pa. 270, 446 A.2d 226 (1982). In addition, in a later attempt to join the District Attorney as a party in the case, it was urged that he "is the one official who has an interest in enforcing bail requirements with respect to detainees" in Philadelphia. *Jackson v. Hendrick*, 72 Pa. Commw. 63, 70, 456 A.2d. 229, 232-33 (1983). Both the Pennsylvania Supreme Court and, separately, the Pennsylvania Commonwealth Court rejected the contention that the District Attorney had established any interest in the prison litigation. The reasoning of the Pennsylvania Commonwealth Court is especially compelling:

> The equity action *sub judice* . . . is not about the setting of bail or the conduct of the District Attorney in carrying out his prosecutorial function. It seeks, rather, a remedy from unconstitutional prison conditions for which the District Attorney has no responsiblility.

Id. at 70, 456 A.2d at 233. *See also Jackson v. Hendrick*, 498 Pa. 270, 278 n.12, 446 A.2d 226, 227 n.12 (1982) (rejecting intervention as untimely, court also concluded, "Apart from his failure to establish any circumstances in support of intervention after entry of the decree, petitioner has failed to establish that denial of intervention has harmed his interests").

The decision of the Third Circuit in *Cobb v. Aytch*, 539 F.2d 297 (3d Cir. 1976), *cert. denied sub nom. Engelfried v. Aytch*, 429 U.S. 1103 (1977), is also instructive in assessing the interest of the Philadelphia District Attorney in litigation related to the operation of the Philadelphia prisons. In *Cobb*, the City and the Commonwealth effected a prisoner transfer to reduce overcrowding and tensions in the Philadelphia prisons. Prison inmates challenged the transfer, which took place pursuant to state statutes that prescribe specific procedures for making inmate transfers between state and county institutions. *Id.* at 298-99 & n.1. Thereafter, the inmates and the Commonwealth agreed to settle the matter, over the objec-

tion of another party to the suit, the Superintendent of the Philadelphia Prison System. *Id.* at 298-99. Ultimately, the court rejected the settlement because it directly and completely extinguished the Superintendent's statutory discretion in seeking inmate transfers. *Id.* at 301. The court addressed no issues of intervention, but did address the interests of the various defendants who appealed the settlement. The Philadelphia District Attorney was one of those defendants. The prosecutor claimed an interest in the inmate transfer process and opposed the settlement because "the consent decree undermines their efforts 'to protect inmate witnesses to crimes from harassment, threat, bodily harm and/or death.'" *Id.* at 300. Ultimately, the court concluded that the District Attorney had no cognizable interest in the prison operation at issue and stated that "we do not believe that the indirect injury which they have alleged is sufficient to confer standing." *Id.*

Although issues relating to standing are not identical to those confronted when assessing a proposed intervenor's interest in litigation, they are related. *See* 3B J. Moore, J. Kennedy & J. Lucas, *Moore's Federal Practice* § 24.07[2] (2d ed. 1986 & Supp. 1986-87) at 24-57. Using the reasoning employed in *Cobb*, any possible effect on prosecution resulting from this settlement is too indirect to give the District Attorney a cognizable interest in these proceedings, which relate only to the operation of and conditions within the prisons. That indirect interest could not support the District Attorney's participation in *Cobb* and should not support his attempted intervention here.[10]

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10. The District Attorney's attempt to rely on *Cobb* to support his position is unavailing. *See* Petition for Certiorari at 14 n.6. The District Attorney interprets *Cobb* to permit his intervention here because he has state-assigned responsibilities regarding releases, just as the Superintendent in *Cobb* had state-assigned responsibilities regarding prisoner transfers. Central to the reasoning in *Cobb*, however, was not the mere existence of responsibilities but the effect that the proposed consent decree would have on those duties. 539 F.2d at 300-01. The court in *Cobb* decided that the consent decree there could not be approved over the Superintendent's objection only because the terms of the consent decree completely and definitely voided the Superintendent's statutory discretion to seek transfers. *Id.* at 301. By contrast, the court of appeals in this case explicitly decided that the

This Court has previously ruled that when addressing issues of state law, it must accord great weight to the opinions of state courts and of federal courts sitting within a state when those courts have decided the issue. *Bishop v. Wood*, 426 U.S. 341, 346 (1976) (Court should accept interpretation of state law in which district court and court of appeals within state have concurred); *United States v. Durham Lumber Co.*, 363 U.S. 522, 526-27 (1960) (Court reluctant to disturb interpretation of state law by federal court skilled in law of particular state); *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 629-30 (1946) (Court pays great deference to interpretation of state law by judges of courts more familiar with intricacies of local law and practice).

For this reason, the opinions in *Jackson* and *Cobb*, and the opinions of the court of appeals and the district court in this case, all of which weigh against the District Attorney's intervention here, should cause this Court to hesitate before disturbing the conclusions of the court below. This hesitance to disturb an interpretation of Pennsylvania law on which the state appellate courts have spoken, and in which both the court of appeals and the district court have concurred, also argues persuasively against a grant of certiorari here.

II. The Court of Appeals Applied the Correct Standard of Appellate Review in Affirming the Denial of Intervention.

In affirming the district court's denial of the District Attorney's motion to intervene, the Court of Appeals for the Third Circuit adopted an "abuse of discretion" standard of appellate review. *See Harris v. Pernsley* at App. 112. According to the District Attorney, the court of appeals thereby contributed to a conflict among the appellate courts that this Court should grant certiorari to resolve. *See* Petition for Certiorari at 26-28. Regardless of whether this issue, standing alone, is sufficiently substantial to be addressed by this Court at some point, the issue as presented in this case does not warrant

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consent decree does not alter or impinge on any of the District Attorney's state-assigned duties. Accordingly, the District Attorney's reliance on *Cobb* is misplaced.

review: the District Attorney's lack of any judicially cognizable interest is so glaring here that under either an abuse of discretion or an error of law standard of review, the Third Circuit correctly affirmed the district court's denial of intervention.

The conflict that appears to exist between the courts of appeals as to the standard of review applicable to the denial of a petition to intervene, *compare, e.g., County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986) (denial of motion to intervene as matter of right is reviewed *de novo*), *cert. denied*, 107 S. Ct. 1605 (1987) *with, e.g., United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 990 (2d Cir. 1984) (review under an abuse of discretion standard) *and Virginia v. Westinghouse Electric Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) (abuse of discretion standard of review); *see also H.L. Hayden Co. v. Siemans Medical Systems, Inc.*, 797 F.2d 85, 89 (2d Cir. 1986) (district court did not err in denying intervention of right); *United States v. Perry County Board of Education*, 567 F.2d 277, 279 (5th Cir. 1978) (rather than clear-cut test to determine required interest, court uses flexible analysis, focusing on particular facts and circumstances, measured by practical standard), is inadequately represented in the context of this case to be resolved by this Court.[11] In considering the issues before them, both the appellate court and the district court in this case conducted thorough and searching reviews sufficient to satisfy either a "plenary" ("*de novo*") or an "abuse of discretion" standard. Both courts fully reviewed the particular legal and factual circumstances of the

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11. Notably, the ostensible conflict that the District Attorney presents for this Court's review has existed at least since 1975. *Compare, e.g., United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 841 (5th Cir. 1975) (erroneous denial of application for intervention by right will be reversed), *cert. denied sub nom. National Org'n for Women, Inc. v. United States*, 425 U.S. 944 (1976) *with Rios v. Enterprise Ass'n Steamfitters Local Union #638*, 520 F.2d 352, 355 (2d Cir. 1975) (district court entitled to full range of reasonable discretion in determining whether requirements for intervention by right have been met). This case presents no extraordinary circumstances that would warrant review of an issue of such long standing. Indeed, as the discussion in the text demonstrates, this case is particularly inappropriate for that review.

case and determined that the District Attorney lacks a sufficient interest to intervene as of right.

In conducting its inquiry, the Court of Appeals for the Third Circuit examined the different legal tests to determine what type of interest is necessary to entitle an applicant to intervene as of right. The court decided to take a pragmatic approach to the question, considering " 'all [of] the competing and relevant interests raised by an application for intervention.' " *Harris v. Pernsley* at App. 111 (quoting *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984)). The court then thoroughly considered the question of what scope of review applies to the denial of a motion to intervene. Writing for the court, Judge Seitz recognized the need to avoid "setting strict legal standards" to measure Rule 24(a)(2) applications and adopted an abuse of discretion standard of review. *Harris v. Pernsley* at App. 112.[12] In reality, the court applied a hybrid of the traditional "plenary" and "abuse of discretion" standards. Consistent with this standard of review, the Third Circuit stated that it would reverse a district court ruling if an improper legal standard was applied or if an incorrect conclusion was reached. *Id.* at App. 113.

In actually applying this standard, the appellate court comprehensively reviewed the asserted interests of the District Attorney and also analyzed whether those interests were directly affected by the instant litigation. The court undertook an independent review of the entire record; it did not depend solely on the district court's findings. Specifically, the court examined applicable state law, which formed the basis of the District Attorney's asserted interests, in light of the factual situation presented by the parties at the hearings held by the district court. *Id.* at App. 113-17. Based on this searching review, literally the functional equivalent of a plenary review, the court determined that the District Attorney's interest in the case is not sufficient for intervention. *Id.* at App. 119-25.

In view of the analytical process used by the court, re-

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12. Rather than ignoring the distinction between intervention as of right and permissive intervention, as the District Attorney suggests, *see* Petition for Certiorari at 27, the court explicitly clarified that it would conduct a more stringent review than the abuse of discretion review accorded denials of motions for permissive intervention. App. 112-13.

gardless of the label attached to that process, the conflict with decisions of other courts of appeals is more apparent than real.[13] From a practical standpoint, the court's review could not have been more plenary. Therefore, a remand would likely do nothing other than produce the same decision, albeit accompanied by a different label. Accordingly, this Court should reject the District Attorney's suggestion that this case presents the appropriate opportunity to resolve that conflict and should deny the District Attorney's petition. *Cf. Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (certiorari not warranted to resolve merely academic problem).

III. The Court of Appeals Properly Dismissed the District Attorney's Appeal of the Approval of the Consent Decree.

In addition to affirming the district court's denial of the District Attorney's Motion to Intervene, the Court of Appeals for the Third Circuit addressed the District Attorney's appeal of the district court's order approving the consent decree. The court did not, however, assess the merits of the consent decree. Rather, concluding that the District Attorney could not appeal the merits of the case, since he was properly denied intervention, the court dismissed the appeal. *Harris v. Pernsley* at App. 128. In so holding, the court emphasized that it did not decide "what legal and factual foundations are required" to uphold the entry of a consent decree, because the merits of the case had been challenged only by a non-party and thus were not properly before it. *Id.* at App. 129.

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13. A review of the opinions in which appellate courts have addressed denials of intervention reveals that the analytical process employed by those courts was essentially identical, whether a plenary or abuse of discretion standard of review was applied. *Compare, e.g., United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984) (abuse of discretion) *with, e.g., United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975) (plenary review), *cert. denied sub nom. National Org'n for Women, Inc. v. United States*, 425 U.S. 944 (1976). Thus, the thorough approach adopted by the court of appeals in this case, notwithstanding its adoption of an abuse of discretion standard, is not unusual. More important, a review of the practical applications of either standard of review merely underscores the futility of granting certiorari here to resolve the apparent conflict.

The dismissal of the District Attorney's appeal does not warrant review on certiorari. The weight of precedent in this Court and in the courts of appeals supports the Third Circuit's holding that a party denied intervention may not appeal the merits of the case. *See, e.g., Brotherhood of Railway Trainmen v. Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 524 (1947) (applicant denied intervention may not appeal subsequent order or judgment in proceeding from which intervention denied); *S.C. Loveland Co. v. United States*, 534 F.2d 958, 960 & n.1 (D.C. Cir. 1976) (because applicant denied intervention was not party to proceedings below, court did not consider appeal of merits but only appeal from denial of intervention); *Pennsylvania v. Rizzo*, 530 F.2d 501, 508 (3d Cir.) (one properly denied status of intervenor may not appeal merits of case), *cert. denied sub nom. Fire Officers Union v. Pennsylvania*, 426 U.S. 921 (1976); *Pellegrino v. Nesbit*, 203 F.2d 463, 468-69 (9th Cir. 1953) (applicant denied intervention may not perfect appeal on merits until intervention question decided on remand); *see also* 7C C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 1923 (2d ed. 1986) at 518 & n.25.

In the face of this uncontested authority, the District Attorney does not, as he could not, directly challenge the reasoning of the Third Circuit in dismissing his appeal. Nonetheless, dissatisfied with that dismissal, he boldly requests that this Court avoid the real issue available for review and consider, instead, the merits of the consent decree, the precise issue the court of appeals explicitly did not address. *See Harris v. Pernsley* at App. 129. He does so by arguing that the district court lacked authority to approve the decree absent a full trial on the merits or specific judicial findings that Philadelphia's prisons violate the Constitution. *See* Petition for Certiorari at 20-26. To persuade this Court to grant certiorari, the District Attorney claims to have identified a split in the circuits on the issue of whether a court may approve a consent decree without either a trial or findings of unconstitutionality. In reality, however, no such split exists. A survey of caselaw addressing judicial authority and responsibility when approving consent decrees demonstrates the unanimity of opinion on that subject. Furthermore, a review of the consent

decree in this case reveals its consistency with that caselaw in general and with prior prison overcrowding decisions in particular. Despite the District Attorney's contentions, this consent decree contains nothing unusual or uncommon, and its approval by the district court presents no issue worthy of this Court's attention, even if that approval were properly reviewable at this time.

As early as 1928, this Court recognized the nature and importance of consent decrees in resolving civil disputes. *See Swift & Co. v. United States*, 276 U.S. 311 (1928). The value of such settlements remains unquestionable today, for

> [n]ot only the parties, but the general public as well, benefit from the saving of time and money that results from the voluntary settlement of litigation. Thus, "[v]oluntary settlement of civil controversies is in high judicial favor."

Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (quoting *Autera v. Robinson*, 419 F.2d 1197, 1199 (D.C. Cir. 1969)), *cert. denied sub nom. Union Carbide Corp. v. Natural Resources Defense Fund*, 467 U.S. 1219 (1984).

Courts have pursued this strong, highly favored policy of encouraging settlement and voluntary remedial action in a wide variety of contexts, including prison overcrowding litigation. *See, e.g., Badgley v. Santacroce*, 800 F.2d 33, 38-39 (2d Cir. 1986) (affirming enforcement of prison admissions moratorium and noting strong judicial policy encouraging settlement of cases), *cert. denied*, 107 S. Ct. 955 (1987). *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (Congress favors settlement in Title VII employment discrimination cases); *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131, 148 n.68 (D.D.C. 1982) (voluntary settlement encouraged in antitrust litigation), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

While pursuing this policy of settlement, however, courts are not meant to routinely approve parties' agreements. On the contrary, the judiciary maintains a vital role in evaluating several important aspects of proposed consent decrees. A court's first responsibility in this regard is to identify the

federal constitutional provision or federal statute that serves as the court's basis for ordering relief. *See, e.g., System Federation No. 91, Railway Employes' Department v. Wright*, 364 U.S. 642, 651 (1961) (court's authority to adopt consent decree comes only from that federal law the decree is meant to enforce); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125 (D.C. Cir. 1983) (focus of court's inquiry when assessing consent decree is purpose of law intended to be enforced), *cert. denied sub nom. Union Carbide Corp. v. Natural Resources Defense Fund*, 467 U.S. 1219 (1984).

Similarly fundamental to a court's responsibility is its determination of whether a proposed consent decree is fair, adequate, reasonable, and appropriate in each case, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980) (trial judge fulfills responsibility upon determination that proposed consent decree is fair, adequate, reasonable, and appropriate), and whether the settlement represents " 'overall fairness to beneficiaries and consistency with the public interest.' " *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 (D.C. Cir. 1977). At least one court has noted that this inquiry becomes especially important in cases that might affect third persons in some way. *Overton v. City of Austin*, 748 F.2d 941, 952-53 (5th Cir. 1984) (no abuse of discretion for district court to refuse to approve or reject proposed consent decree pending inquiry into fairness and reasonableness of decree). This inquiry is also important because, once approved, a consent decree has the same effect as a decree issued after a full trial on the merits. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

In evaluating whether consent decrees are fair and reasonable, courts need not withhold approval of proposed decrees until they conduct full trials on the merits or otherwise establish prerequisite findings of unconstitutionality. In fact, approved consent decrees often contain specific denials of fault or liability, and a court's authority to enter such a decree without forcing the parties to a full trial or to admissions of constitutional violations is long-established. *See Swift & Co. v. United States*, 276 U.S. 311 (1928). In *Swift*, the Court specifically rejected the idea that approval of a consent decree was

improper absent factual findings of federal law violations, and concluded that "allegations of the bill not specifically denied may have afforded ample basis for [the] decree." *Id* at 327.

Since *Swift*, numerous other judicial opinions have clarified the nature of the "ample basis" normally necessary to permit approval of a consent decree. Those opinions establish that a court need only identify a *prima facie* case supporting a complaint before establishing a basis for its authority to approve a proposed decree. *See Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1130 (2d Cir. 1983) (*prima facie* showing of discrimination constitutes sufficiently serious claim to serve as predicate for voluntary compromise), *cert. denied sub nom. Althiser v. New York State Department of Correctional Services*, 465 U.S. 1005 (1984). *See also Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 226-27 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); *City of San Francisco v. San Francisco Police Officers Association*, 621 F. Supp. 1221, 1223 (N.D. Cal. 1985). This authority to approve a consent decree remains valid even if the remedy adopted in the consent decree somehow conflicts with or disrupts state or local law. *Sarabia v. Toledo Police Patrolman's Association*, 601 F.2d 914, 918 (6th Cir. 1979) (local civil service rule that conflicts with provisions of approved consent decree must give way).

Of course, judicial discretion in the adoption of consent decrees is not unfettered. A court could not, for example, approve a consent decree that violates the federal law it is intended to enforce. *See Society Hill Civic Association v. Harris*, 632 F.2d 1045, 1057-58 (3d Cir. 1980) (permitting challenge to earlier consent decree because district court lacked authority to approve, in consent decree or otherwise, plans for housing in urban renewal project that violated federal statutory requirement of compliance with local zoning ordinances). Neither could a court enforce a consent decree that placed a direct financial obligation on a party not before the court. *Washington v. Penwell*, 700 F.2d 570, 573-74 (9th Cir. 1983) (consent decree unenforceable to extent it bound state legislature, not before court in litigation, to fund legal services perpetually).

With these general principles in mind, the appropri-

ateness and propriety of the consent decree in this matter become clear. In evaluating and adopting this decree, the district court faithfully applied these principles. Furthermore, it approved a consent decree consistent with those adopted in other inmate overcrowding cases.

Certainly, the district court had, at issue before it, identifiable federal law provisions. By alleging unconstitutional prison overcrowding, the plaintiffs invoked the protections guaranteed by the cruel and unusual punishment clause of the eighth amendment for sentenced inmates, *see Rhodes v. Chapman*, 452 U.S. 337 (1981), and the due process clause of the fourteenth amendment for pretrial detainees. *See Bell v. Wolfish*, 441 U.S. 520 (1979).

There can also be no credible dispute in this case as to whether the district court fulfilled its responsibility to evaluate the fairness of the decree. First, the court had before it a well-established *prima facie* case of overcrowding. Specifically, the district court had, for its consideration: the unanswered second amended complaint; the court's own observations of the prison facilities at issue, made during a personal tour of those facilities; various stipulations regarding conditions within the prisons, accepted during intervention proceedings; various statistical reports concerning cell numbers, cell sizes, inmate populations, and descriptions of daily inmate life within the prisons; information and argument regarding the wisdom of the consent decree offered by both proponents and opponents of the decree at hearings conducted to assist the court's evaluation, *see Harris v. Pernsley* at App. 50; *Harris v. Pernsley*, 654 F. Supp. 1042, 1045 (E.D. Pa. 1987); and all of the opinions and orders issued in a related state court proceeding in which the Philadelphia prisons remained under a declaration of unconstitutionality for almost fourteen years. *See Jackson v. Hendrick*, 509 Pa. 456, 503 A.2d 400 (1986). Thus, the court reviewed a record that established, at the very least, a *prima facie* case of overcrowding, and that record served as the "ample basis" for the court's authority to approve a consent decree.

In its opinion approving the decree, the district court fully documented its consideration of the fairness, adequacy, reasonableness, and appropriateness of the decree. *Harris v.*

Pernsley,' 654 F. Supp. 1042 (E.D. Pa. 1987) (*passim*). In addition, the district court exhaustively considered the effect the decree might have on third parties, particularly the District Attorney and the state criminal courts. In this regard, the court ruled correctly that the decree would, at most, have only an indirect impact on persons not parties to the litigation. *Harris v. Pernsley* at App. 48-68. For all these reasons, the district court properly evaluated and approved the consent decree in this matter. In doing so, the district court took no unusual action. Population caps and/or admissions moratoriums are among the most common remedies implemented in prison overcrowding litigation.[14]

Similarly, little doubt exists as to a court's authority to implement overcrowding remedies by consent decree; at least

14. *See, e.g., Duran v. Elrod*, 760 F.2d 756, 757 (7th Cir. 1985) (affirming lower court order capping Cook County jails, resulting in release of more than 10,000 inmates during 1984); *Badgley v. Varelas*, 729 F.2d 894, 903 (2d Cir. 1984) (directing implementation of admissions moratorium on county jail to reduce overcrowding); *Ruiz v. Estelle*, 679 F.2d 1115, 1148 (5th Cir.) (affirming portion of trial court decree requiring reduction in prison population by certain date and establishing admissions moratorium if mandated levels not achieved) *am'd in part, vacated in part, reh. denied in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Jones v. Diamond*, 636 F.2d 1364, 1383 (5th Cir.) (district court directed on remand to set maximum number of prisoners confined and to enjoin confinement of greater number), *am'd sub nom. Ledbetter v. Jones*, 453 U.S. 911, *cert. dismissed*, 453 U.S. 950 (1981); *Williams v. Edwards*, 547 F.2d 1206, 1215, 1219 (5th Cir. 1977) (affirming trial court order forbidding new admissions to inmate population); *Costello v. Wainwright*, 525 F.2d 1239, 1242, 1252 (5th Cir.) (affirming trial court order requiring reduction of population by specific date and criticizing defendants for not expanding early release policy), *vacated*, 539 F.2d 547 (5th Cir. 1976) *(en banc), rev'd and remanded*, 430 U.S. 325 (1977), *on remand*, 553 F.2d 506 (5th Cir. 1977) *(en banc)* (panel opinion reinstated); *Inmates of Allegheny County Jail v. Wecht*, 573 F. Supp. 454, 457-58 (W.D. Pa. 1983) (county jail population cap level maintained by formula of one release for every admission); *Benjamin v. Malcolm*, 564 F. Supp. 668, 691 (S.D.N.Y. 1983) (refusing to modify order capping population of New York City jail); *McMurry v. Phelps*, 533 F. Supp. 742, 775 (W.D. La. 1982) (establishing cap on inmate population); *Gross v. Tazewell County Jail*, 533 F. Supp. 413, 436 (W.D. Va. 1982) (establishing cap on number of inmates and procedure for release whenever population exceeds cap); *Vqzquez v. Gray*, 523 F. Supp. 1359, 1366 (S.D.N.Y. 1981) (acknowledging court authority to release prisoners if necessary to reduce overcrowding).

two other courts have previously done just that. In *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984), for example, the court considered various mechanisms to reduce inmate populations and selected an admissions moratorium. *Id.* at 903. Significantly, it did so following its conclusions that no violation of any constitutional provision had been proved and that no such proof was necessary to either adopt or enforce the consent decree at issue. *Id.* at 899-900 (relying on *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).[15]

Similarly, in *Duran v. Elrod*, 713 F.2d 292 (7th Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984), the parties entered a consent decree in a prison overcrowding lawsuit. Although the original decree in that case contained no maximum population levels or enforcement mechanisms, the parties agreed to cap levels in the course of enforcement proceedings. On appeal, the court specifically rejected a contention that the parties and, consequently, the district court had no authority to order releases in order to enforce the decree. *Id.* at 293-94, 298. Again, that court identified no findings of unconstitutional conditions before it directed the release of more than 10,000 inmates. *See Duran v. Elrod*, 760 F.2d 756, 757 (7th Cir. 1985).

Here, the District Attorney cites no caselaw from the context of prison conditions litigation to contradict the rulings of the *Badgley* and *Duran* courts. His attempts to find oppos-

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15. The only difference between the instant case and *Badgley* is that the consent decree here contains an enforcement mechanism (admissions moratorium), while the original *Badgley* decree contained only maximum population levels; enforcement in *Badgley* came after a period of violation of the population levels. This single difference highlights the insignificance of the issue raised here by the District Attorney regarding the propriety of including a moratorium in the consent decree itself. As discussed earlier, the Philadelphia Home Rule Charter gives the City administration full authority to determine maximum population levels within the City prisons. Not even the District Attorney contests the City's right, pursuant to that authority, to set those population levels and include them in a consent decree. *Badgley* teaches that a court may enforce its consent decree, once approved, even through a moratorium mechanism not previously agreed to by any party. It is pure folly to suggest that the district court may not, in a consent decree, describe in advance how it will exercise its enforcement authority.

ing authority in other contexts flounders upon examination of the cases he cites. To support his contention that some courts have held that findings of unconstitutionality are necessary to confer authority to approve consent decrees, the District Attorney cites three cases and makes reference to several dissenting opinions by members of this Court. Ultimately, none supports his position.

For example, the District Attorney cites *Washington v. Penwell*, 700 F.2d 570 (9th Cir. 1983), for the proposition that "absent a federal law violation, a consent decree entered in a federal court cannot preempt state law." Petition for Certiorari at 23 n.20. In fact, *Penwell* cannot support this proposition because the court never addressed the need for a finding of unconstitutionality before it could accept a consent decree. Rather, this case involved the question of whether a court could enforce a consent decree provision perpetually binding the state of Washington to fund inmate legal services when the state was not a party to the action and had not consented to being sued. *Id.* at 574. Predictably, the court concluded that the provision was unenforceable in light of eleventh amendment considerations, and because the decree imposed a direct financial burden on a non-party to the litigation. *Id.*[16]

Similarly, *Society Hill Civic Association v. Harris*, 632 F.2d 1045 (3d Cir. 1980), provides no support for the District Attorney's position. In that case, the court reversed the district court's dismissal of the action and ruled that the plaintiffs were not collaterally estopped from challenging an earlier consent decree. The court based its decision on the fact that the plaintiffs were not parties to the earlier litigation and on

16. The District Attorney's reliance on *Penwell* is also difficult to understand because the only discussion in that case of a court's authority regarding state law actually contradicts his position. In considering whether the constitutional guarantee of access to courts required the provision of legal services, the court concluded that no such requirement existed. 700 F.2d at 574. If it had, the *Penwell* court acknowledged, the federal court would have had authority to adopt and enforce a consent decree that called for the provision of those legal services despite any protests or objections by the state. *Id.* Since consent decrees typically contain denials of liability or unconstitutionality, the *Penwell* court thus confirmed by implication its authority to act, consistent with constitutional guarantees, in opposition to state law, even absent findings of unconstitutionality.

the fact that they had not unreasonably delayed their challenge in court. The court explained that the plaintiffs might have presented a legitimate challenge to the consent decree when they alleged that the decree violated the federal law it was intended to enforce. *Id.* at 1057-58. If so, the court reasoned, the district court had no authority to order the challenged relief at any time, either before or after a trial on the merits. *Id.* Again, the court never addressed the district court's pretrial versus post-trial authority to order relief and never even touched on the issue of conflicts between consent decrees and state law. The court discussed only the requirements and prohibitions of the federal statute at issue and whether a consent decree could violate that federal statute.[17]

Next, the District Attorney cites a passage from *Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984), as support. *See* Petition for Certiorari at 22-23. In *Overton*, the plaintiffs challenged the constitutionality of the city's election system. When the district court failed to approve, reject, or otherwise act on a consent decree within ten days of its proposal, the parties appealed from what they characterized as a *de facto* denial of the decree. They also sought a writ of mandamus ordering the district court to approve the proposed decree. *Id.* at 946. The appellate court first rejected the appeal as interlocutory. *Id.* at 952. The court next rejected the mandamus request, holding that the district court did not abuse its discretion when it delayed action on a consent decree until it conducted a factual hearing to evaluate the validity of objections made to the proposed decree. *Id.* at 957-58. The passage quoted by the District Attorney occurs in the context of the

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17. Similar discussions occurred in other writings referred to by the District Attorney. For example, in his dissent from a denial of certiorari in *Bushey v. New York State Civil Serv. Comm'n*, 469 U.S. 1117 (1985), Justice, now Chief Justice, Rehnquist stated that he would grant certiorari to consider the issue of whether the 14th amendment and Title VII ever authorize voluntary affirmative action by a state employer. That is, the lower court might have lacked authority to approve the consent decree at issue because the remedy called for might violate the federal law meant to be enforced. Again, this citation provides no support whatsoever for the proposition that a court may not, absent findings of unconstitutionality, approve a consent decree that suspends state law.

court's recitation of some of the objections raised by would-be intervenors and serves only as a basis for the court's holding that the district court did not abuse its discretion in delaying approval of the decree until the objections could be considered fully. The court of appeals never discussed the district court's authority to approve the proposed decree. Significantly, the District Attorney cites to no such discussion within the case.

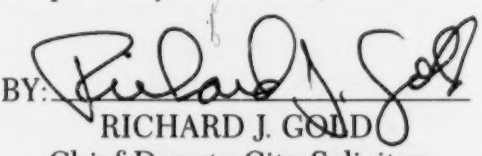
Finally, the District Attorney seems to rely on a quote from *Leslz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987). *See* Petition for Certiorari at 24 n.22. In that case, the court rejected those parts of a consent decree that violated state law but that had been included in the settlement only to resolve pendent state-law claims. *Id.* at 1251. The rejected portion of the settlement had no basis in or relation to any federal claim. *Id.* The court concluded that a federal court was not free to reach out and manipulate state law when doing so is completely unrelated to any federal right or claim. The case does not support the proposition that a federal court must find proven violations before it can approve a decree intended to enforce a federal right.

When accurately reviewed, the District Attorney's position on this issue lacks any caselaw support whatsoever. Certainly, no split exists among the circuits. If anything, the rule proposed by the District Attorney here flatly violates the unanimous and well-established policy of encouraging settlements in civil actions. In fact, by eliminating the authority of courts to approve consent decrees without proof of constitutional violations, his rule would not only discourage settlements, it might actually require full trials in every case. For all the reasons set forth above, this position is unsupported and in direct opposition to established jurisprudence.

CONCLUSION

For all the reasons stated above, the City respondents respectfully request this Court to deny the District Attorney's Petition for Writ of Certiorari.

Respectfully submitted,

BY: 

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, ALBERT ANTHONY, ORLANDO X. McCREA, TYRONE GLENN, CARLOS ROYSTER, AMIN ABDULLAH, KHALID ALLAH MUHAMMAD, and ARNOLD FURTICK, CHARLES OAKES, EMANUEL GARDNER	:	CIVIL ACTION
v.	:	
IRENE PERNSLEY, individually and in her official capacity as Commissioner of the Department of Human Services of the City of Philadelphia, ROYAL L. SIMS, REV. ALBERT CAMPBELL, LABORA BENNETT, JAMES BARBER, MARK MENDEL, DONALD PADOVA, each individually and in his or her official capacity as a member of the Board of Trustees of the Philadelphia Prison System DAVID S. OWENS, individually and in his official capacity as Superintendent of the Philadelphia Prison System, GUETON CURIONE, individually and in his official capacity as Warden of Holmesburg Prison, PHILLIP DUKES, individually and in his official capacity as Warden of the Detention Center, JOHN DAUGHEN, individually and in his official capacity as Warden of the House of Corrections, RODNEY D. JOHNSON, individually, LEO C. BROOKS, individually, JAMES S. WHITE, individually and in his official capacity as Managing Director	:	

of the City of Philadelphia, :
WILLIAM J. GREEN, individually, :
HON. WILSON GOODE, individually :
and in his official capacity as Mayor of :
the City of Philadelphia, :
CITY OF PHILADELPHIA :
JAY C. WALDMAN, individually and in :
his official capacity as General Counsel :
for the Commonwealth of Pennsylvania, :
RONALD J. MARKS, individually, :
GLEN JEFFES, individually and in his :
official capacity as Commissioner of the :
Pennsylvania Department of Corrections. :

ORDER

AND NOW, this 13th day of July, 1987, upon consideration of the joint motion of the plaintiff class and the city defendants to amend the final order, it is ORDERED that:

1. The joint motion is GRANTED.

2. Paragraphs 2f and 2g of this court's Order of December 30, 1986 are AMENDED to read as follows:

2f. The population of the Philadelphia Prisons shall not exceed the following levels:

As of July 20, 1987	—3,950 inmates
As of September 14, 1987	—3,850 inmates
As of October 19, 1987	—3,750 inmates

Thereafter, the prison population shall not exceed 3,750 until the opening of the downtown detention facility. All population levels established by this subsection shall be referred to hereafter as "the maximum allowable populations."

2g. On and after October 19, 1987, the population of the respective individual facilities within the Philadelphia Prison System shall not exceed the following levels:

Detention Center	750 inmates
Holmesburg	800 inmates
House of Correction	900 inmates
Women's Modular Units	200 inmates

Laural Hall, Cannery and YMCA	250 inmates
Philadelphia Industrial Correction Center	850 inmates
TOTAL	3,750 inmates

3. In all other respects, this court's Order of December 30, 1987 shall remain unchanged.

/s/ NORMA L. SHAPIRO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, et al.	:	CIVIL ACTION
v.	:	
IRENE PERNSLEY, et al.	:	NO. 82-1847

ORDER

AND NOW, this 25th day of September upon consideration of:

1) Municipal Defendants' Motion to Enlarge Time;

2) Stipulation dated September 25, 1987;

3) The procedural history of repeated petitions for stay, the most recent of which is pending;

It appearing to the court that the uncertainty as to whether or not a stay would be granted by appellate court has made it difficult to proceed with compliance and, the parties having agreed to submit a plan to insure future compliance, a reasonable extension of compliance dates being in the interest of justice, it is ORDERED that:

1) Municipal Defendants' Motion to Enlarge Time is denied as moot.

2) The parties shall comply with the stipulation attached hereto and made a part hereof.

3) The proposed plan required by Pa. 3 of said stipulation, shall also address computerization needs and plans of the Philadelphia court system.

In addition, the parties shall brief the following no later than October 26, 1987:

A) Under Pennsylvania law, where inmates serving sentences of between 2 and 5 years may be held, by whom the place of incarceration is determined and whether this determination is mandatory, discretionary, final or appealable;

B) Pennsylvania and federal law regarding timeliness of sentencing;

C) Pennsylvania and federal law regarding incarceration of probation and parole violators and timeliness of disposition of said charges.

4) A hearing will be held on Thursday, November 5, 1987 at 9:00 a.m. in Courtroom 10-A.

The parties shall be prepared to make part of the record the number as of the end of October of:

A. Inmates serving sentences of between two and five years in the Philadelphia prisons who are eligible for incarceration in state correctional facilities.

B. Inmates held on alleged violations of state probation or parole who could be incarcerated in state correctional facilities awaiting review of their charges.

C. Convicted inmates awaiting sentencing and the length of time since conviction.

D. Persons held for trial in Philadelphia's Municipal Court and the length of time they have been held.

5) David S. Owens, named a party in his individual as well as official capacity as Superintendent of Philadelphia Prison System, now commissioner of prisons of the Commonwealth of Pennsylvania is requested to attend together with his successor in office in Philadelphia.

/s/ NORMA L. SHAPIRO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN HARRIS, et al.	:	CIVIL ACTION
v.	:	
IRENE F. PERNSLEY, et al.	:	NO. 82-1847

STIPULATION

WHEREAS, despite the exercise of good faith efforts, City-Defendants have failed to maintain the maximum allowable population within the limits prescribed by the Court's December 30, 1986 Order, as amended by Order dated July 13, 1987;

WHEREAS, the experience under the Order of December 30, 1986, reinforces the conviction of the parties that, short of enforcing the moratorium on new admissions contemplated under Paragraph 5 of the Order, attainment and maintenance of the maximum allowable population require a reduction in the length of time currently required for the trial and disposition of criminal cases in the Philadelphia Court of Common Pleas and Municipal Court;

WHEREAS, the parties and the Court remain committed to achieving an orderly and permanent reduction of the population of the Philadelphia County Prisons to the previously agreed-upon levels;

WHEREAS, City-Defendants understand that the Court will not tolerate further delay in the achievement and maintenance of the maximum allowable population and will enforce the provisions of Paragraph 5 of the Order of December 30, 1986, establishing a qualified moratorium on new prison admissions if the terms of this Stipulation are not satisfied;

NOW THEREFORE, the Parties, with the approval of the Court, hereby agree as follows:

1. Temporary Stay

The provisions of Paragraph 5 of the Order of December 30, 1986, are temporarily stayed in accordance with the further terms of this Stipulation, notwithstanding City-Defendants' failure to maintain the aggregate population of the Philadelphia County Prisons within the applicable maximum allowable population. The provisions of Paragraph 5 shall apply in the event City-Defendants fail to achieve the following milestones or to perform any of the undertakings hereafter specified.

2. Milestones

The maximum allowable population of the Philadelphia County Prisons shall be 3,750 as of November 23, 1987. By October 1, 1987, the parties shall submit to the Court a schedule of intermediate milestones.

3. Plan for Permanent Amelioration of Overcrowding

No later than October 26, 1987, City-Defendants shall submit to the Court a plan, approved and endorsed by the appropriate officials of the Court of Common Pleas of Philadelphia County and the Municipal Court of Philadelphia County. Such plan shall specify the measures being implemented and which will be implemented to achieve and maintain the maximum allowable population on a continuing basis over time. Such plan shall, among other things, address such changes in the administration of criminal cases as the Courts intend to adopt to reduce delays in the conduct of hearings, trials, and sentencings for persons held in detention. The plan shall also contain a schedule for its implementation.

4. Reapplication of Admissions Moratorium

If the milestones stated in paragraph 2 hereof are not achieved or the plan contemplated by paragraph 3 hereof is not submitted timely, the provisions of Paragraph 5 of the Order of December 30, 1986 shall apply with full force. Submission of the plan shall not excuse a failure to achieve the

then-applicable milestone. Failure to submit a timely, acceptable plan shall trigger the provisions of Paragraph 5 unless City-Defendants have, by October 26, 1987, achieved compliance with the final maximum allowable population for each facility.

5. Revisions of Order

By October 9, 1987, the parties shall have negotiated and submitted to the Court proposed modifications to the Order of December 30, 1986, for the purpose of better effectuating the intent of the Order to maintain the maximum allowable population on a continuing, not sporadic, basis.

/s/ DAVID RICHMAN

DAVID RICHMAN
Counsel for Plaintiffs

/s/ RICHARD J. GOLD

RICHARD J. GOLD
Counsel for City Defendants

Dated: September 25, 1987

APPROVED:

/s/ NORMA L. SHAPIRO

J.

Supreme Court, U.S.
FILED
OCT 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-447

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

MARTIN HARRIS, et al.,
Plaintiffs-Respondents

v.

IRENE PERNSLEY, et al.,
Defendants-Respondents

RONALD D. CASTILLE,
District Attorney of Philadelphia County,
Proposed Intervenor-Petitioner

REPLY BRIEF FOR PETITIONER

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NO. 87-447

IN THE
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MARTIN HARRIS, et al.,
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Defendants-Respondents

RONALD D. CASTILLE,
District Attorney of Philadelphia County,
Proposed Intervenor-Petitioner

REPLY BRIEF FOR PETITIONER

SUPPLEMENTAL STATEMENT OF THE CASE

On September 14, 1987, petitioner Ronald D. Castille, District Attorney of Philadelphia County, filed a petition for certiorari seeking review of the Third Circuit's decision in Harris v. Pernsley, 820 F.2d 592 (3d Cir. 1987), which affirmed

(1) the denial of Mr. Castille's motion to intervene in this prison conditions lawsuit, and (2) the District Court's approval of a consent decree requiring the release or non-admission of prisoners to meet stringent prison population caps although there has been no finding that the Philadelphia County prisons are unconstitutionally overcrowded. In this Reply Brief, petitioner updates the case's procedural history and includes information concerning the municipal defendants-respondents' inability to meet the caps to which they agreed. These subsequent events further substantiate the need for this Court's review.

Well prior to the filing of his certiorari request, petitioner sought a stay from this Court. Pending response and full Court consideration, a temporary stay was entered on July 23, 1987, by the Honorable Byron R. White. In their subsequent response, respondents clearly led both

this Court and petitioner to believe that they had planned sufficiently to continue to meet the population caps, that there would be no release of prisoners other than low bail pre-trial detainees, and that there would be no need to close the prison doors and refuse to admit newly sentenced or arrested persons in order to comply with the population caps.[1]

On August 3, 1987, the full Court denied a stay. At that time, the first

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[1] See Response of City Respondents to Petitioner's First Application, page 7 ("[T]he City respondents have undertaken ... to institute systemic changes that will completely avoid any wholesale release of prisoners in the future."); page 8 ("[T]he City respondents will decrease the prison population without any wholesale release of inmates...."); pages 26-27 ("[T]he population of the Philadelphia Prison System has been reduced, safely and gradually, from 4,300 to 3,950 inmates."); page 29 ("The City respondents have continued the planning necessary to meet the ordered population levels ... An essential component of that plan is to reduce the number of pre-trial detainees being held on low bail....").

population cap of 3,950 had just recently taken effect, the consent decree had not been violated, and only the least drastic enforcement mechanism -- release of prisoners by lowering bail -- had been implemented.

Despite both the assertions of the municipal defendants-respondents as to existing plans to meet the caps, and their efforts beginning in March of 1987 to lower the population by releasing prisoners on bail, the prison population exceeded the population cap for all but eleven days from July 30, 1987 to October 4, 1987, the last date for which petitioner has figures. Indeed, to the best of petitioner's knowledge, the population cap has never been met since September 4, 1987. The municipal defendants-respondents' inability to meet their agreement occurred because, contrary to their claims, there simply are not enough low-risk inmates that can responsibly be

released to meet the population caps. The state bailmaster has refused to release prisoners in the number sought by respondent.

Under the consent decree, the municipal defendants-respondents' inability to meet the caps meant that non-admissions would occur at least by September 26, 1987. Petitioner, therefore, filed a second application for a stay, based on changed circumstances, with this Court on September 18, 1987. On September 22, 1987, however, the Clerk's Office informed petitioner that his application would not be considered until the Third Circuit had had an opportunity to consider the changed circumstances and enter a stay. Petitioner, therefore, filed a second motion for a stay pending certiorari with the Third Circuit on September 23, 1987. At approximately the same time, the municipal defendants-respondents, who

were still unable to meet the cap through bail releases, filed a Motion to Enlarge Time for complying with the consent decree with the District Court in order to avoid beginning the September 26, 1987 admissions moratorium.

On September 25, 1987, the Honorable Norma L. Shapiro, the judge who had approved the consent decree, delayed the implementation of the non-admissions provision and denied as moot the Motion to Enlarge Time. The municipal defendants-respondents, however, avoided the September 26, 1987 admissions moratorium by entering a stipulation with the plaintiffs-respondents which was then incorporated into Judge Shapiro's order denying the Motion to Enlarge Time. In addition to approving the stipulation, Judge Shapiro's order (1) required briefing

on three new subjects,[2] (2) required that the parties provide figures on four groups of inmates,[3] and (3) scheduled a hearing for November 5, 1987. In the stipulation, the respondents acknowledged that, unless there was an admissions moratorium, the caps could not be met pursuant to the present

---

[2]The matters to be briefed are: (1) under Pennsylvania law, where inmates serving sentences of between two and five years may be held, by whom the place of incarceration is determined and whether this determination is mandatory, discretionary, final or appealable; (2) Pennsylvania and federal law regarding timeliness of sentencing; and (3) Pennsylvania and federal law regarding incarceration of probation and parole violators and timeliness of disposition of said charges.

[3]These are (1) inmates serving sentences of between two and five years in the Philadelphia prisons who are eligible for incarceration in state correctional facilities; (2) inmates held on alleged violation of state probation or parole who could be incarcerated in state correctional facilities awaiting review of their charges; (3) convicted inmates awaiting sentencing and the length of time since conviction; and (4) persons held for trial in Philadelphia's Municipal Court and the length of time they have been held.

consent decree's enforcement mechanisms. The parties asserted that they would attempt to comply with the caps by agreeing on new enforcement mechanisms that would reduce the alleged delay in various judicial hearings. The final cap of 3,750 was moved from October 19, 1987 to November 23, 1987. By October 1, 1987, the parties were to have submitted to Judge Shapiro a timetable of intermediate caps or milestones. The stipulation provides that this new timetable of caps will be enforced according to the original non-admissions provision. The new schedule, which was timely submitted, provides as follows:

October 15 - 3,950
November 9 - 3,850
November 23 - 3,750

It is unclear what mechanism(s) will ultimately be adopted to meet the caps agreed to by the City. Under the stipulation, however, the parties must submit to the District Court, by October 26, 1987, a

plan approved and endorsed by officials of the Court of Common Pleas of Philadelphia County and the Municipal Court of Philadelphia County. This plan is intended to provide a new means of enforcing the previously agreed upon population caps and must include changes in court administration to accelerate hearings, trials, and sentencings. The order also requires the respondents to negotiate and implement a whole new set of prisoner release mechanisms without providing any notice to or participation by petitioner. In addition, Judge Shapiro has requested briefs, statistics or proposed plans on nearly every aspect of the state's criminal judicial system in Philadelphia, and has indicated in a letter to Chief Justice Nix of the Pennsylvania Supreme Court, that she will consider appointing a federal prison master at the November 5, 1987 hearing now scheduled. All of the foregoing demonstrates a very substantial

likelihood of impermissible federal court intrusion into the state court system.

On October 5, 1987, a divided Third Circuit panel, after considering, inter alia, the District Court's intervening action extending the time for the non-admissions moratorium, denied petitioner's stay request. It remains to be seen whether the municipal defendants-respondents can now responsibly meet the agreed-upon caps.[4] Recently, the Administrative Judge of the Common Pleas Court advised petitioner that the municipal defendants-respondents are now actively seeking to meet the cap by obtaining 300 beds on an emergency basis in the state prison system. Should they be successful in this stopgap endeavor, petitioner will not again seek

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[4] They have recently attempted to do so by seeking the early release of approximately 200 sentenced county prisoners. Petitioner has taken great exception to that approach.

an emergency stay from this Court. The problem created by the caps which they have agreed to, however, will remain for years to come.

The activity in this case subsequent to petitioner's filing for certiorari on September 14, 1987, while important to the question of the appropriateness of a stay, in no way changes the substantive issues presented in the petition for certiorari. Respondents have carried out some of the actions that petitioner contends they wholly lack the legal authority to undertake. They have, in fact, agreed in the latest stipulation to implement further actions to enforce the population caps which are, likewise, beyond their legal authority.

SUPPLEMENTAL ARGUMENT

The municipal defendants-respondents claim in their response that the district court was presented with a prima facie case of overcrowding and imply that the district court judge found that there had been a prima facie showing of unconstitutional conditions. They further allege that merely a prima facie showing of any federal law violation provides a sufficient basis for contravening state statutory law and state judicial orders.

The only case respondents cite for this latter remarkable view on the powers of federal courts to approve decrees which violate state law is Sarabia v. Toledo Police Patrolman's Association, 601 F.2d 914 (6th Cir. 1979). In Sarabia, however, there was no clear statement on whether discrimination had been admitted or proved. The reference in the decree to "past

employment discrimination" indicates that there was an admission, not merely prima facie proof, of discrimination.[5]

Likewise, the municipal defendants-respondents erroneously suggest that Judge Shapiro found prima facie evidence of unconstitutional conditions. Her opinion indicates quite the contrary. Specifically, she stated that changes in the law, most notably Rhodes v. Chapman, 452 U.S. 337 (1981), and the use of the totality of the conditions of confinement test, "virtually eliminate[s] the likelihood that conditions of confinement will be declared unconstitutional on a motion

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[5]By way of contrast, the plaintiffs-respondents ignore the supremacy clause completely and misstate petitioner's argument. Petitioner does not claim that consent decrees cannot be approved absent a finding of unconstitutionality. Rather, petitioner more narrowly argues only that when a consent decree violates state law, there must be a finding of unconstitutionality.

for summary judgment" (R. A-1175). She further acknowledged that even serious overcrowding could be insufficient to prove unconstitutional conditions.[6]

The municipal defendants-respondents further imply that the evidence presented at the intervention hearing supported a prima facie case of unconstitutional overcrowding. This is untrue. Respondents presented no evidence on this issue. Rather, it was petitioner who presented extensive stipulations at the intervention hearing to establish that the

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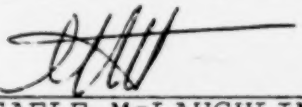
[6]The municipal defendants-respondents also claim that the finding of the state court in 1972, see Jackson v. Hendrick, 10 Pa. Commw. 392, 309 A.2d 187 (1973), that there were unconstitutional conditions is a component of their prima facie showing of present unconstitutional conditions. In 1986, however, the Pennsylvania Supreme Court, in Jackson v. Hendrick, 509 Pa. 456 (1986), vacated a prior finding of unconstitutionality and remanded the case. Indeed, Judge Shapiro noted in her opinion that "[r]ecent developments in the Jackson litigation also make a finding of liability less certain" (R. A-1175).

prisons, which then held approximately 4,300 inmates, were not unconstitutionally overcrowded. This evidence included the specific number of cells, the cell sizes, the average prison population figures, the prisoner's daily routine, and the extensive medical and psychiatric care available, as well as the comprehensive social service, educational, vocational and recreational programs. See Third Circuit Appendix at 627-747. In total, far from establishing a prima facie case of unconstitutional conditions, this evidence refuted any conceivable claim that the prison population unconstitutionally exceeded the prison's capacity.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioner's principal petition for writ of certiorari, it is respectfully requested that a writ of certiorari issue to review the decision below.

Respectfully submitted



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